Supreme Court, U.S.
APR 1993

92-1645

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE CITY OF LOS ANGELES,

Petitioner,

vs.

JOHNNY LEE JACKSON,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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I.

Does imposing municipal liability under 42 U.S.C. Section 1983, when a high ranking municipal officer violates an individual's Fourth Amendment rights by a discretionary act pursuant to a facially neutral municipal policy, revive the doctrine of respondeat superior?

II.

Is the Fourth Amendment the source of the prohibition on imposing discipline against a police officer who refuses to obey an unreasonable order to submit to drug testing for non-criminal, administrative purposes?

III.

Does the Fourth Amendment require that an order directing a police officer to submit to drug testing for non-criminal, administrative purposes be supported by individualized, articulated, reasonable suspicion, based on objective facts, of drug use, impairment, or ingestion?

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THE CITY OF LOS ANGELES,

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Petition for a Writ of Certiorari
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_____

Petitioner the City of Los Angeles respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled matter on September 17, 1992 as amended November 27, 1992.

PARTIES TO THE PROCEEDINGS BELOW

In the trial court the plaintiff was Johnny Lee Jackson, respondent in this petition. The defendants included the City of Los Angeles, a municipal corporation, ("the City"), Daryl F. Gates in his official capacity as Chief of Police and as an individual, and Robert Gil, Richard Bonneau, Barry Morrison, and Steve Murphy as individuals. In the Court of Appeals the City and Daryl F. Gates in his official capacity were appellants, and Jackson was the appellee. Gates had judgment entered against him in the trial court in his official capacity as Chief of Police for the City of Los Angeles only. After the appeal was taken to the Court of Appeals, Gates retired from his position and no longer has any interest in this action.

OPINIONS BELOW

The trial court rulings and judgment were not reported in any official or non-official reporter. The opinion of the Court of Appeals is reported at 975 F.2d 648 and at 7 BNA IER CAS 1249 and is reprinted in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1992 and amended November 27, 1992. The City filed a petition for rehearing on October 2, 1992. That petition was denied on February 19, 1993. The District Court had jurisdiction pursuant to 28 U.S.C. § 1343. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This

Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 states in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 202 of the Los Angeles City Charter is too voluminous to be recited here, and is therefore reprinted in the appendix.

STATEMENT OF THE CASE

Respondent Johnny Lee Jackson (hereinafter "Jackson") sued under 42 U.S.C § 1983 asserting claims under the Fourth, Fifth, and Fourteenth Amendments and pendant claims under California law. The defendants were the City of Los Angeles, Daryl F. Gates, individually and in his capacity as Chief of Police, and Robert Gil, Richard Bonneau, Barry Morrison, and Steve Murphy as individuals.

The district court dismissed all state causes of action and entered summary judgment for all the defendants as to all § 1983 causes of action based

on the Fifth and Fourteenth Amendments. The district court also granted summary judgment to Gil, Bonneau, Morrison, Murphy, and Gates in his individual capacity as to all remaining causes of action based upon their qualified immunity from liability. After those rulings, the only issues remaining in the case were whether there had been a violation of Jackson's Fourth Amendment rights, and, if so, whether the City of Los Angeles was liable for any damages he incurred.[1]

On September 14, 1989, a jury found the City liable to Jackson in the amount of $154,747.00 and on October 6,

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[1]It is well-settled that the suit against Gates in his official capacity was tantamount to a suit against the municipality. Brandon v. Holt, 469 U.S. 464 (1985); Will v. Michigan Department of State Police, 491 U.S. 58, 71, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989).

1989, judgment was entered. A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit. That Court, Judge Rymer dissenting, affirmed the judgment. Jackson v. Gates, 975 F.2d 648 (9th Cir. 1992). A petition for rehearing was denied and a suggestion for rehearing en banc was rejected.

STATEMENT OF THE FACTS

The facts were reported by the Ninth Circuit as follows:

> "Los Angeles Police Department ('LAPD') Officers Leach and Jackson were assigned to the same police station. Sometime before February 1986, the Internal Affairs Division of the LAPD ('IAD') began conducting

undercover surveillance of Officer John Leach, whom they suspected of illegal drug use. IAD undercover officers saw Jackson and Leach together on two separate occasions during their investigation.

"On the afternoon of February 13, 1986, Jackson got into Leach's car, and the two drove to an apartment building in Hollywood. The building was known by the IAD officers to be the site of narcotics sales and use. Leach entered the building while Jackson remained in the car. Leach returned with a woman, and the three drove to another apartment building

also considered by the IAD officers to be a location of illegal drug sales and use. Leach and the woman went into that building while Jackson again waited in the car. Leach returned alone, and the two drove to Leach's residence in North Hollywood.

"After some time at Leach's residence, the two returned to the second apartment building. As before, Leach entered the building while Jackson waited in the car. The two left, with Leach driving in a manner characterized by the surveilling officers as 'calculated to avoid being followed.'

"The IAD's undercover surveillance of Leach then ceased until February 20, 1986. On that day, undercover IAD officers saw Leach and Jackson leave the station together after both had finished their work shifts. Leach drove with Jackson to Exposition Park where, according to the officers, the two drank beer and talked. Later that evening, Leach returned alone to one of the buildings believed by police to be a 'narcotics location.'

"The IAD officers then took Leach into custody. Pursuant to a warrant, the Officers searched Leach's

car, uncovering 'a tinfoil bindle which in size and shape was consistent with the packaging of cocaine.'

"Under orders from their captain, IAD officers went to Jackson's home on February 21, 1986, at 1:30 a.m., and ordered him to provide a urine specimen. Jackson objected. The officers then ordered Jackson to accompany them to Parker Center in downtown Los Angeles.

"Once there, Jackson met with a union representative of the Los Angeles Police Protective League ('League'). Jackson then received a formal order to provide a urine sample under

contemporaneous observation by an IAD officer in the public restroom for drug testing. He refused the order.

"On July 24, 1986, Jackson was suspended without pay pending a hearing on the charge of insubordination. An administrative panel found Jackson guilty of refusing to comply with a lawful order, and recommended discharge from the LAPD. Police Chief Gates accepted the panel's finding, and terminated Jackson effective July 24, 1986.

"Jackson pursued the grievance procedures available to him, which

provided that his dispute with the LAPD be submitted to binding arbitration. The arbitrator concluded that the labor agreement between the League and the LAPD did not authorize compulsory urinalysis in Jackson's case. A year and one-half later, the LAPD reinstated Jackson and restored his lost benefits, including back pay, in accordance with the arbitrator's decision." Appendix pp. A-2-A-7, 975 F.2d 648, 650-651, footnotes omitted.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER A MUNICIPALITY IS LIABLE WHEN A HIGH RANKING MUNICIPAL OFFICER EXERCISES DISCRETION UNDER A FACIALLY NEUTRAL MUNICIPAL POLICY AND VIOLATES AN INDIVIDUAL'S RIGHTS GUARANTEED UNDER THE FOURTH AMENDMENT

The Court of Appeals found that the City was liable to Jackson under 42 U.S.C. § 1983 despite the Court's recognition that the applicable City policies were not unconstitutional. The effect, if not the intent, of that holding is to reinstitute respondeat superior as a basis of municipal liability when the responsible

municipal employee is a high-ranking City officer.

Municipalities are liable under 42 U.S.C. § 1983 only if the municipality causes an injury which amounts to a constitutional deprivation. In Collins v. City of Harker Heights, __U.S.__, 112 S.Ct. 1061, 1066; 117 L.Ed.2d 261; 60 U.S.L.W. 4182 (1992, No. 90-1279.) this Court reiterated the elements of municipal liability for a constitutional injury: whether plaintiff's harm was caused by a constitutional violation, and if so, whether the city is responsible for that violation. The controlling principle is that the constitutional tort be caused by action taken pursuant to official municipal policy of some nature. Monell v. New York City Department of Social Services, 436 U.S.

658 (1978). Decisions and acts of subordinate officials do not create municipal policy. St. Louis v. Prapotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). A municipality will be held to have caused such an injury only when the acts which produce it are ones "which the municipality has officially sanctioned or ordered." Pembaur v. Cincinatti, 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Only municipal officials who have "final policymaking authority" may by their policy-making actions subject the municipality to § 1983 liability. Id. at 475 U.S. 483.

The Ninth Circuit found that denying Jackson the right to be free from adverse consequences for refusing to submit to an unreasonable search was a constitutional tort, satisfying the

first prong of the Harker Heights test. Appendix pp. A-18-A-19, 975 F.2d 648, 653. The Court of Appeals then considered the City policy, the "obey now – grieve later" rule, which requires its police officers to obey orders under pain of insubordination. Although the Court recognized that the rule "is not per se unconstitutional," the Court nonetheless determined that the City was liable because its Chief of Police, by firing Jackson, was implementing the rule. Appendix p. A-26, 975 F.2d 648, 654. The Chief of Police, the Court pointed out, possessed final policy-making authority on disciplining police officers. Appendix p. A-29, 975 F.2d 654, 655. Hence, the City was liable for his constitutional tort to Jackson.

This Court has warned repeatedly that § 1983 cannot be used to create municipal liability through a theory of respondeat superior. Monell v. New York City Department of Social Services, supra, 436 U.S. 658, 691 (1978); Pembaur v. Cincinatti, supra, 475 U.S. 469. Maintaining the distinction between municipal fault and respondeat superior becomes especially important when the tort-feasor is a policy-making officer of the municipality, as is the case in this matter.

Pembaur recognized that a single decision by a high-ranking officer may be a policy-setting act subjecting the municipal employer to Monell liability. In Pembaur, a county prosecutor had directed police to forcibly enter a private business to execute body

attachments issued for two witnesses. In the § 1983 suit which followed, it was established that there was no policy or practice regarding the use of force under those circumstances; no one could recall an instance in which the issue had arisen. Hence, the county prosecutor had made the only official decision on record on that issue. This Court held that a single decision of a policy maker could establish policy, whether the policy maker was a legislative body or an executive officer, such as the prosecutor. Pembaur, 475 U.S. 469, 480. Hence, where no other policy controlled, that single decision could be sufficient to establish municipal liability.

A decision-maker clearly possesses final authority to establish municipal policy where there is no municipal

policy on the issue, as was the case in Pembaur. When a constitutional tort occurs, and no policy either authorizes or bars the constitutional deprivation, it is appropriate to consider the actions of a "decision-maker possess[ing] final authority to establish municipal policy with respect to the action ordered."

Where there is a municipal policy in effect applicable to the actions of the decision-maker, a different issue is presented.

> "[N]ot every decision by . municipal officers automatically subjects the municipally to § 1983 liability. . . . The fact that a particular official – even a policymaking official – has discretion in the

> exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." Pembaur, 475 U.S. 469 at 482-483 (plurality opinion.)

When a municipal policy is applicable, the decision-maker is exercising discretion under the umbrella of the greater policy, and municipal liability does not arise, for "[m]unicipal liability attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered." Ibid. The Pembaur plurality, in a hypothetical fact situation virtually duplicating the instant case, suggested an example of a sheriff with

discretion to fire employees pursuant to constitutional policies which the sheriff did not establish. If the sheriff exercised the discretion in an unconstitutional manner, no municipal liability would arise. Pembaur, 475 U.S. 469 at 483 fn. 12.

The City has a policy regulating administrative searches for drug testing. That policy was adopted by negotiation with the police union, that policy is binding on the City, including its Chief of Police, and, as the Court of Appeals admits, that policy is constitutional. Appendix p. A-26, 975 F.2d 648, 654. The policy bars unconstitutional searches. The City also has a policy requiring its police officers to obey orders, under pain of insubordination, and to challenge the propriety of orders

through the grievance process. The Ninth Circuit agrees that this "obey now – grieve later" policy is not unconstitutional. The policy does not authorize disciplining officers if the order they refuse to obey is unlawful. Appendix p. A-6, 975 F.2d 648, 651 (Jackson found "guilty of refusing to comply with a lawful order.")

These two policies, coupled with the provisions of Los Angeles City Charter § 202,[2] clearly vest the Chief of Police with discretion to impose discipline. Appendix p. A-6, 975 F.2d 648, 651, citing Charter of the City of

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[2]The Charter assigns to a Board of Rights, an administrative body, the fact-finding responsibilities in police disciplinary matters. The Board also recommends a penalty if it finds an officer guilty. The Chief of Police must carry out the Board's recommendation unless he elects to impose a lesser penalty. Appendix p. B-58.

Los Angeles §§ 202(12)-(13). When the Chief of Police elected to terminate Jackson based upon the administrative panel's findings, he did no more than exercise the discretion vested in him. The constitutional tort was caused by his exercise of discretion. Hence, although he could be liable for his discretionary act, no municipal liability can arise from it.

The Ninth Circuit's implicit rejection of the distinction between the acts of a decision-maker which make policy and the acts of a decision-maker pursuant to a policy is contrary to the plurality opinion in Pembaur and is without support in any other Circuit. This unwarranted reintroduction of respondeat superior into accepted standards of municipal liability should therefore be reviewed.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER THE FOURTH AMENDMENT IS VIOLATED WHEN A POLICE OFFICER IS DISCIPLINED FOR REFUSING TO SUBMIT TO DRUG TESTING

This court has stated:

"[There are] two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." Collins v. City of Harker Heights, __U.S.__, 112 S.Ct. 1061; 117 L.Ed.2d

261; 60 U.S.L.W. 4182 (1992, No. 90-1279.)

Implicit in the first of those issues is the requirement that the constitutional violation be identified with specificity.

Jackson was fired by the City for insubordination when he refused to obey the order to submit to drug testing. He appealed the firing using the grievance and arbitration procedure provided by the City, prevailed[3], and was reinstated.

The City concedes that in general a public employee can not be fired for

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[3]The arbitrator found that the order to provide a urine specimen did not meet the protocols established when the issue of drug testing was negotiated between the City and the League. The arbitrator did not decide whether the order was constitutionally reasonable or not.

exercising a protected constitutional right. Gardner v. Broderick, 392 U.S. 273, 276-79, 20 L.Ed.2d 1082, 88 S.Ct. 1913 (1968) The City argued to the District Court and to the Court of Appeals that the Fourteenth Amendment guarantee to due process contains this protection and therefore is the source of the constitutional violation asserted in a § 1983 suit.

The district court agreed that Jackson's rights under that provision had not been violated, and granted summary judgment to the City. Jackson did not appeal from that order. The Court of Appeals on its own initiative reconsidered the ruling and agreed that Jackson had suffered no deprivation of either the procedural or the substantive rights to due process of

the Fourteenth Amendment. Appendix p. A-39-A-40, 975 F.2d 648, 656.

The district court, however, disagreed that the Fourteenth Amendment was the only applicable constitutional provision. It allowed Jackson to proceed on the theory that the Fourth Amendment was the source of his constitutional violation, and the Court of Appeals agreed[4] that Jackson had demonstrated a cause of action under § 1983 based on the violation of a Fourth Amendment right:

> "[I]t is established law that no one should suffer harm by

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[4]In supplementary briefs filed after oral argument before the Ninth Circuit, the City noted that whether the Fourth Amendment implies a right to be free from adverse consequences for asserting its rights "is certainly not without question" and assumed arguendo that the proposition were true. The City did not intend to concede the matter, however.

> state action for asserting a constitutionally protected right. [Para.] The jury found that the order Jackson disobeyed required him to submit to an unconstitutional search. Because the right to be free from unreasonable searches is contained explicitly in the Fourth Amendment, it follows that the right to be free from adverse consequences for refusing to submit to an unreasonable search must also be found there." Appendix p. A-18-A-19, 975 F.2d 648, 652, emphasis added.

The Court of Appeals' bare conclusion quoted above is a quantum

leap from conventional Fourth Amendment analysis. The Fourth Amendment on its face protects against unreasonable searches and seizures but does not, on its face, create any rights beyond those protections. The most well-known and well-discussed Fourth Amendment offspring is the exclusionary rule, which prohibits the use of evidence obtained by government officers in violation of the Amendment. The source of the exclusionary rule, first stated in Weeks v. United States, 232 U.S. 383 (1914), has been the subject of intense intellectual and legal analysis. This Court resolved that analysis only in 1984 when it clearly stated that the exclusionary rule is not a personal constitutional right but is a judicially created remedy. United States v. Leon, 468 U.S. 897, 906, 104

S.Ct. 3405, 82 L.Ed.2d 677 (1984). By contrast to the judicial system's measured and analytical development of the role of the exclusionary rule, the Court of Appeals has now created a new personal constitutional right, enforceable under § 1983, within the Fourth Amendment, and has done so without so much as a single sentence of analysis.

The potential for mischief in the Court of Appeals' holding is manifest. If "the right to be free from adverse consequences for refusing to submit to an unreasonable search" is indeed an ingredient of the Fourth Amendment, than any adverse consequence caused by government agents following a refusal to submit to a search can be the basis for a § 1983 suit. Proof of adverse consequence would establish the

constitutional harm and entitle a plaintiff to at least nominal damages. Carey v. Pithus, 435 U.S. 247, 55 L.Ed.2d 252, 98 S.Ct. 1042 (1978).

In the instant case, Jackson was suspended without pay while an administrative panel determined whether he was guilty. The suspension itself could be an "adverse consequence" and a violation of the Fourth Amendment -- even if the panel had upheld Jackson's action and restored him to his position. Arguably, any investigative or adjudicatory action that the City took in seeking to determine whether its police officer had been insubordinate, no matter how fair the process and no matter how evenhandedly it was administered, could be an "adverse consequence."

A government agency employing peace officers thus is placed in an untenable dilemma by the new Court of Appeals rule. The agency clearly has to assure that its peace officer employees are not drug abusers. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 103 L.Ed.2d 685, 109 S.Ct. 1384 (1989); National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989). However, if a peace officer refuses to submit to drug testing, the government agency will expose itself to suit under § 1983, and expose its constituents to monetary damages, if it undertakes any action, temporary or not, against the officer while evaluating the legitimacy of his refusal.

The Court of Appeal's unprecedented expansion of the rights

guaranteed by the Fourth Amendment, and its concomitant expansion of the scope of § 1983 litigation, should therefore be reviewed by this Court.

III.

CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER AN ORDER DIRECTING A POLICE OFFICER TO SUBMIT TO DRUG TESTING FOR NON-CRIMINAL, ADMINISTRATIVE PURPOSES MUST BE SUPPORTED BY INDIVIDUALIZED, ARTICULATED, REASONABLE SUSPICION, BASED ON OBJECTIVE FACTS, OF DRUG USE, IMPAIRMENT, OR INGESTION

This case turns on whether the order to Jackson to submit a urine specimen to be tested for evidence of drug usage for administrative purposes was reasonable under the Fourth

Amendment. The trial court instructed the jury

> "a search may lawfully be compelled only when there is an individualized, articulated, reasonable suspicion, based on objective facts, of drug use, impairment or ingestion." Appendix p. A-21, 795 F.2d 648, 653.

The jury, after being so instructed, found that the order given to Jackson did not meet that standard. The Ninth Circuit upheld the trial court's instruction on reasonableness.

The City argued both in the district court and the Court of Appeals that the standard for evaluating the reasonableness of the order was not so

stringent, citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 103 L.Ed.2d 685, 109 S.Ct. 1384 (1989) and Railway Labor Executive's Assoc. v. Skinner, 489 U.S. 602, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989). Those two cases

> "reaffirm[] the long standing principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance . . . . [W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expecta-

> tions against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." National Treasury Employees Union v. Von Raab, supra, at 109 S.Ct. 1390; Railway Labor Executives' Assoc. v. Skinner, supra, at 109 S.Ct. 1413-1414.

These cases and others in the line establish that no degree of individualized suspicion is necessarily required to order a police officer to submit to administrative drug testing for non-criminal purposes. This is true whether the test is triggered by

event such as an accident or an application for promotion, Railway Labor Executives' Assoc. v. Skinner and National Treasury Employees Union v. Von Raab, or is administered pursuant to some random scheme, National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989), cert. denied November 14, 1989 (493 U.S. 963), Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990), and International Brotherhood of Electrical Workers etc. et al v. Skinner, 913 F.2d 1454, 90 Daily Journal D.A.R. 13090 (9th Cir. November 20, 1990.)

The Ninth Circuit itself has recognized that administrative searches of police officers in contexts other than drug testing need not be supported by a showing of probable cause.

Rather, such searches will be allowed if they are merely found to be reasonable. Kirkpatrick v. City of Los Angeles, 803 F.2d 485 (9th Cir, 1986), Los Angeles Police Protective League v. Gates, 907 F.2d 879 (9th Cir. 1990). Whether a particular administrative search is reasonable depends on a balancing of the governmental and private interests and a consideration of such matters as the intrusiveness of the administrative search, the circumstances under which the search is conducted, and the public need being served by the search. Thus, in Kirkpatrick the Court of Appeals found that a strip search, even though conducted under reasonable circumstances, was so intrusive that it required some degree of suspicion, termed "well-founded suspicion" in that

case, although less that probable cause was needed. The Ninth Circuit's balancing test is identical to the balancing test utilized in Skinner and Von Raab to determine whether the individual officer's privacy expectations are outweighed by the Government's interest in preventing the threat to public safety posed by drug impaired, armed police officers.

A balancing test is clearly the best method of determining whether an order such as that given to Jackson was reasonable. A police officer's private interest in not having to submit to a drug test must be acknowledged. However, the government, and the public, have a legitimate public interest in assuring that those to whom they entrust their police powers be trustworthy. "We confer vast powers

upon them . . . . They are armed and they must make many judgments that affect the rights of numerous citizens each day." Los Angeles Police Protective League v. Gates, supra, 907 F.2d 879, 885 (9th Cir. 1990.) When an individual officer is suspected of using narcotics, the public interest is greatly implicated.

The presence of individualized suspicion is always a relevant factor to be considered whenever a Fourth Amendment intrusion occurs. Von Raab and Skinner, however, say that it is not an indispensable one. When the balancing test is performed, courts must look at all the factors involved in the search to determine whether some level of individualized suspicion is required to justify the intrusion. If

some level is required, the courts must then determine the degree.

The level of individualized suspicion required by the Ninth Circuit is not constitutionally required under this Court's standards, under the Ninth Circuit's standards expressed in other of its cases, or by the standards of other Circuits. See Copeland v. Philadelphia Police Department, 840 F.2d 1139 (3rd Cir. 1988).

The Ninth Circuit's determination that individualized suspicion is always required for administrative drug testing of police officers should therefore be reviewed by this Court.

CONCLUSION

For the reasons argued above, the writ should be issued.

DATED: March 31, 1993

Respectfully submitted,

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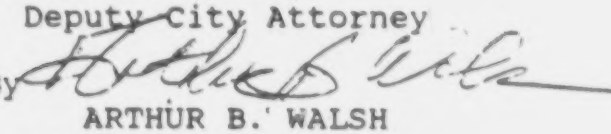
By 
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APPENDIX A

No. 90-55728

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY LEE JACKSON,

Plaintiff-
Appellee,

vs.

DARYL GATES; CITY OF
LOS ANGELES,

Defendants-
Appellants.

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975 F.2d 648; 1992 U.S. App. LEXIS 22066; 7 BNA IER CAS 1249; 92 Cal. Daily Op. Service 7877; 92 Daily Journal DAR 12847

December 3, 1991, Argued and Submitted, Pasadena, California.

September 17, 1992, Filed As Amended November 27, 1992.

Arthur B. Walsh, Deputy City Attorney, Los Angeles, California, for the defendants-appellants.

Michael P. Stone, Stone, Feeley & DePasquale, Los Angeles, California, for the plaintiff-appellee.

Appeal from the United States District Court for the Central District of California. D.C. No. CV-87-1085-RSWL. Ronald S.W. Lew, District Judge, Presiding.

Before: Harry Pregerson, William C. Canby, Jr., and Pamela Ann Rymer, Circuit Judges.

PREGERSON, Circuit Judge:

The City of Los Angeles and Los Angeles Police Chief Gates (collectively "appellants") appeal the denial of their motions for summary judgment, directed verdict, new trial, and judgment notwithstanding the verdict, and the jury award in favor of Los Angeles Police Officer Johnny Lee Jackson. Jackson brought this action after being discharged for refusing to comply with an order to provide a urine sample for drug testing. We hold that appellants' termination of Jackson because he refused to comply with the order violated his Fourth Amendment rights. Further, we hold that the jury was properly instructed on the applicable Fourth Amendment standard, which required the police to

demonstrate an articulable reasonable basis for suspecting Jackson of drug use before ordering him to submit to the urinalysis.

BACKGROUND

Los Angeles Police Department ("LAPD") Officers Leach and Jackson were assigned to the same police station. Sometime before February 1986, the Internal Affairs Division of the LAPD ("IAD") began conducting undercover surveillance of Officer John Leach, whom they suspected of illegal drug use. IAD undercover officers saw Jackson and Leach together on two separate occasions during their investigation.

On the afternoon of February 13, 1986, Jackson got into Leach's car, and the two drove to an apartment building

in Hollywood. The building was known by the IAD officers to be the site of narcotics sales and use. Leach entered the building while Jackson remained in the car. Leach returned with a woman, and the three drove to another apartment building also considered by the IAD officers to be a location of illegal drug sales and use. Leach and the woman went into that building while Jackson again waited in the car. Leach returned alone, and the two drove to Leach's residence in North Hollywood.

After some time at Leach's residence, the two returned to the second apartment building. As before, Leach entered the building while Jackson waited in the car. The two left, with Leach driving in a manner characterized by the surveilling

officers as "calculated to avoid being followed."

The IAD's undercover surveillance of Leach then ceased until February 20, 1986. On that day, undercover IAD officers saw Leach and Jackson leave the station together after both had finished their work shifts. Leach drove with Jackson to Exposition Park where, according to the officers, the two drank beer and talked. Later that evening, Leach returned alone to one of the buildings believed by police to be a "narcotics location."

The IAD officers then took Leach into custody. Pursuant to a warrant, the Officers searched Leach's car, uncovering "a tinfoil bindle which in size and shape was consistent with the packaging of cocaine."

Under orders from their captain, IAD officers went to Jackson's home on February 21, 1986, at 1:30 a.m., and ordered him to provide a urine specimen. Jackson objected. The officers then ordered Jackson to accompany them to Parker Center in downtown Los Angeles.[1]

Once there, Jackson met with a union representative of the Los Angeles Police Protective League ("League"). Jackson then received a formal order to provide a urine sample under contemporaneous observation by an IAD

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[1]The parties agree that Jackson was not under arrest. Jackson claims, however, that he was taken to the station against his will. Appellants claim that Jackson was free to disobey, subject "only to the risk of administrative discipline."

officer in the public restroom for drug testing. He refused the order.[2]

On July 24, 1986, Jackson was suspended without pay pending a hearing on the charge of insubordination. An administrative panel found Jackson guilty of refusing to comply with a lawful order, and recommended discharge from the LAPD. Police Chief Gates accepted the panel's finding, and terminated Jackson effective July 24, 1986. See Charter of the City of Los Angeles @@ 202(12)-(13).

Jackson pursued the grievance procedures available to him, which provided that his dispute with the LAPD be submitted to binding arbitration. The arbitrator concluded that the labor

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[2]At some point, Jackson was informed by IAD investigators that refusing the order could result in disciplinary action.

agreement between the League and the LAPD did not authorize compulsory urinalysis in Jackson's case. A year and one-half later, the LAPD reinstated Jackson and restored his lost benefits, including back pay, in accordance with the arbitrator's decision.

Jackson filed this lawsuit claiming damages under 42 U.S.C. @ 1983 for alleged violations of his Fourth, Fifth, and Fourteenth Amendment rights. The parties on both sides filed motions for summary judgment.[3] The district court granted summary judgment for all defendants sued in their individual capacity, including Police Chief Gates,

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[3]Jackson's claims under the Fifth and Fourteenth Amendments and under state law were denied on summary judgment. Although not initially raised on appeal, we requested the parties to submit briefs concerning whether the district court erred in dismissing the Fifth Amendment claim.

on grounds of qualified immunity.[4] Appellants' motion for summary judgment on the issues of Jackson's Fourth Amendment claim and municipal liability was twice denied.

Following trial, the jury returned a verdict for Jackson of $ 154,747. The district court entered judgment on the verdict, and denied motions filed by appellants for a directed verdict, for judgment notwithstanding the verdict or, in the alternative, for a new trial. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. @ 1291.

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[4]Specifically, the district court found that the right to be free from compulsory urinalysis in the absence of reasonable suspicion was not clearly established in February 1986.

DISCUSSION

I. Fourth Amendment Claim

Appellants contend that the district court erred by denying their motion for summary judgment on Jackson's Fourth Amendment claim under 42 U.S.C. @ 1983. Specifically, appellants argue that the order to Jackson to submit to a urinalysis drug test was reasonable under the Fourth Amendment even absent a reasonable individualized and articulated suspicion of drug use, impairment, or ingestion.[5]

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[5]Before trial, appellants contended that the drug testing order given to Officer Jackson was consistent with the Memorandum Of Understanding ("MOU") in effect under the collective bargaining agreement between the LAPD and the League. The MOU addressed the specific issue of an officer's right to be free from random or arbitrary searches as follows:

(continued...)

A. Jackson's Rights Under the Fourth Amendment

We review the district court's grant of a motion for summary judgment

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[5](...continued)

An employee shall not be required to submit a sample of blood, breath, or urine for the purposes of determining the presence of a narcotic, drug, or alcohol, nor shall an employee be required to submit to a field sobriety examination unless:

> The employee exhibits objective symptoms of being under the influence of alcohol and/or a narcotic or drugs; OR
>
> There is substantial evidence to indicate the officer has ingested or absorbed by the body in any other manner an alcoholic beverage, narcotic, or drug.

Memorandum of Understanding, Article 37. Due to the absence of "objective symptoms" or "substantial evidence" that Jackson was under the influence of narcotics, the arbitration board found the IAD's request to Jackson improper. Accordingly, Jackson was reinstated with back pay in his position prior to trial. This appeal does not concern that reinstatement or arbitration award.

de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 496 U.S. 937, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989).

Appellants argue that the Supreme Court's decisions in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989), and Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989), require no degree of individualized

suspicion before ordering a police officer to submit to an administrative drug test. Thus, they contend that the order compelling Jackson to submit to urinalysis was not constitutionally unreasonable. We do not agree that these cases support the result appellants suggest.

It is well established that a urinalysis drug test is a search within the meaning of the Fourth Amendment. See Von Raab, 489 U.S. at 665; Railway Labor, 489 U.S. at 617; International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1299 (9th Cir. 1991). To be deemed reasonable, a search generally must be supported by a warrant issued upon probable cause. Von Raab, 489 U.S. at 665. However, "neither a warrant nor probable cause, nor, indeed, any measure of

individualized suspicion, is an indispensable component of reasonableness in every circumstance." Id.

In Von Raab, the Supreme Court considered the constitutionality of drug testing of U.S. Customs Service employees interested in transfer or promotion to positions involving exceptional duties such as drug interdiction and the use of firearms. The Court held that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."

Id. at 665-66 (emphasis added). Applying this balancing test, the Court concluded that the government's interests in safeguarding the national border and in public safety outweighed the privacy expectations of employees who sought certain promotions. Id. at 677.

In Railway Labor, the Court upheld the constitutionality of the drug testing of railway employees involved in certain accidents or who violated certain safety rules. The Court concluded that the government's compelling interest in ensuring public safety outweighed employee privacy concerns and justified post-accident drug testing even absent individualized suspicion. Railway Labor, 489 U.S. at 633.

The purpose of requiring the government to obtain a warrant, or to have probable cause or reasonable suspicion before conducting a search, is to prevent random or arbitrary intrusions by government agents. Id. at 621-22. Von Raab and Railway Labor provide an exception to this requirement where the government demonstrates a compelling safety interest.

In the present case, appellants demonstrate no special compelling interests under Von Raab or Railway Labor, which would justify a search because there was no triggering event or employment pre-promotion requirement[6] involved.

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[6]Drug testing absent any individualized suspicion was the pre-promotion requirement which the Supreme Court upheld in Von Raab.

Appellants also offer National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989) to support their contention that no degree of individualized suspicion is required for administrative drug testing of police officers. In National Federation, civilian police officers employed by the Army were subjected to random drug testing for administrative purposes with no "limiting factor" other than mere randomness. The court found the program constitutionally acceptable despite the absence of any individualized suspicion.

However, National Federation is inapposite to the present case. Jackson was not ordered to submit to urinalysis as part of a random drug testing program targeted at the entire police force. Rather, Jackson was singled out

for testing based only on his association with another officer who was under IAD surveillance.

In sum, the IAD had no articulable, individualized basis for suspecting that Jackson was using narcotics. Nor was he tested through some random testing program being administered to the police force. Further, appellants demonstrate no special compelling interests which would justify the order given to Jackson. Thus, it was unreasonable under the Fourth Amendment for the IAD to order Jackson to provide a urine sample for drug testing.

B. Constitutional basis for Jackson's claim

The issue was raised whether Jackson's Fourth Amendment rights were actually violated since he did not

comply with the urinalysis order. As the Supreme Court pointed out in Gardner v. Broderick, 392 U.S. 273, 276-79, 20 L. Ed. 2d 1082, 88 S. Ct. 1913 (1968), it is improper to discharge an officer from duty to punish him for exercising rights guaranteed to him under the constitution. Thus, it is established law that no one should suffer harm by state action for asserting a constitutionally protected right.

The jury found that the order Jackson disobeyed required him to submit to an unconstitutional search. Because the right to be free from unreasonable searches is contained explicitly in the Fourth Amendment, it follows that the right to be free from adverse consequences for refusing to

submit to an unreasonable search must also be found there.

Los Angeles Police Protective League v. Gates, 907 F.2d 879 (9th Cir. 1990), supports this proposition. There, we held that disciplining police officer Gibson for his refusal to accede to an unconstitutional search warrant violated his Fourth Amendment rights. Although we did not state that this protection was specifically enumerated under the Fourth Amendment, there was "little doubt that it was improper for the [City] to discipline Gibson when he refused to allow a search of his garage." Id. at 886.

In the present case, Jackson did not actually submit to the IAD order to provide a urine specimen for drug testing. However, it is not necessary for the physical search to have

occurred. The City's firing of Jackson for his refusal to submit to the unconstitutional search is sufficient to maintain Jackson's claim that his Fourth Amendment rights were violated.

C. Jury Instructions

We review jury instructions to determine whether, "considering the charge as a whole, the court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." Thorsted v. Kelly, 858 F.2d 571, 573 (9th Cir. 1988). "The trial judge has substantial latitude in tailoring the instructions, and challenges to the formulation adopted by the court are reviewed for abuse of discretion." U.S. v. Beltran-Rios, 878 F.2d 1208, 1214 (9th Cir. 1989).

The district court instructed the jury that drug testing by urinalysis is a search within the meaning of the Fourth Amendment. In addition, the court instructed the jury that the search was reasonable only if supported by "an individualized, articulated reasonable suspicion, based on objective facts, of drug use, impairment, or ingestion." By returning a verdict for Jackson, the jury found that the order to Jackson was unreasonable according to the standard set out in the court's instructions.

Chief Gates and the City of Los Angeles argue that the district court's instructions were erroneous because they instructed the jury to apply an overly stringent standard for determining the reasonableness of compelled urinalysis. In addition, they

contend that the court erred in refusing their proffered instructions that the Fourth Amendment does not require a finding of individualized suspicion to justify the reasonableness of the order to search Officer Jackson. We disagree.

Contrary to appellants' assertions, the jury instructions given represent an accurate interpretation of our Fourth Amendment case law and are consistent with recent Supreme Court decisions that we have already discussed. The district court concluded, and we agree, that the standards developed by the Supreme Court upholding the validity of random, post-accident, or pre-ascension drug testing programs against Fourth Amendment challenge are inapplicable to suspicion-based drug testing.

Accordingly, the jury instructions were correct.

II. Municipal Liability under @ 1983

The City contends that it cannot be liable because Jackson was not disciplined pursuant to an unconstitutional municipal policy. Specifically, it claims that because the injury suffered by Jackson was not a product of a policy intended for the purpose of violating Jackson's constitutional rights, it was not liable for the harm caused by the unconstitutional order. Further, it contends that the actions of Police Chief Gates and the Police Board of Review do not create liability because neither party is a "final policy-maker" as required under 42 U.S.C. @ 1983.

Several requirements must be satisfied for a municipality to incur liability. First, the injury must amount to a constitutional deprivation. St. Louis v. Praprotnik , 485 U.S. 112, 108 S. Ct. 915, 923, 99 L. Ed. 2d 107 (1988). As noted above, the jury found that the drug testing order was unreasonable and thus violated Jackson's Fourth Amendment rights.

Second, the municipality will be held to have caused an injury only when the acts which produce it were sanctioned by the municipality. Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 1298, 89 L. Ed. 2d 452 (1986). The City contends that it did not officially order or condone the police department's violation of Jackson's civil rights. Therefore, it claims that it did not sanction the

action which resulted in Jackson's constitutional deprivation. Although the City cites to no authority, it further asserts that it cannot be held liable because it cannot be charged with knowing that punishing Jackson for refusing the order would amount to a Fourth Amendment violation. It contends that any other result would be to impose liability on a municipality whenever any interim action was later found to have violated a person's constitutional rights.

As noted above, the MOU specified the circumstances under which an officer could be subjected to a urinalysis order. See supra, note 5. Despite whether the City's policy-makers knew that the order would subject the City to liability, they were aware that the order was arguably

improper. Further, in this circuit a policy itself need only cause a constitutional violation; it need not be unconstitutional per se. McKinley v. City of Eloy, 705 F.2d 1110, 1117 (9th Cir. 1983).

In the present case, Jackson concedes that the City had no policy requiring unreasonable searches of its police officers. His termination was the result of the City's official municipal policy and custom manifested in the "obey now -grieve later" rule. Although this policy is not per se unconstitutional, Chief Gates' implementation of the policy resulted in a constitutional tort against Jackson.[7] Thus, the City is liable to

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[7]Jackson's challenge to the City's "obey now - grieve later" policy, as applied by the City's policymaker even (continued...)

Jackson for civil damages, whether or not they intended the result or had full knowledge of the possible consequences of their actions.

The third requirement specifies that only municipal officials who have "final policy-making authority" may, by their actions, subject the municipality to @ 1983 liability. Pembaur v. City of Cincinnati, 106 S. Ct. at 1299. The determination of who constitutes a "final policy-maker" for purposes of @ 1983 is a question of state law. See City of St. Louis v. Praprotnik , 485

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[7](...continued)
to unconstitutional orders, is what differentiates this case from Los Angeles Police Protective League v. Gates, 907 F.2d 879 (9th Cir. 1990). In Protective League, there appears to have been no such challenge, and our discussion of municipal liability focused only on the absence of a City policy or carrying out unconstitutional searches of police officer's homes. See id. at 890.

U.S. 112, 108 S. Ct. 915, 924-28, 99 L. Ed. 2d 107 (1988); Gobel v. Maricopa County, 867 F.2d 1201, 1207 (9th Cir. 1989). The district court's interpretation of state law is reviewed de novo. Salve Regina College v. Russell, 113 L. Ed. 2d 190, 111 S. Ct. 1217, 1221 (1991); Matter of McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc).

Appellants contend that Chief Gates is not the final authority concerning the termination of an officer because ultimately the officer may submit the matter to arbitration for consideration under the collective bargaining agreement between the League and the City. Following a hearing, the arbitrator may require the City to reinstate the officer.

This contention is without merit as it completely misconstrues the roles of both Chief Gates and the arbitration board. Under the Charter of the City of Los Angeles, the applicable state law in this case, the police chief is clearly the final authority on disciplining officers. The arbitrator is a neutral entity who "is confined to interpretation and application of the collective bargaining agreement," thus merely implementing the intent of the parties. United Steel Workers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 1361 , 4 L. Ed. 2d 1424 (1960). The arbitrator has no authority to set or alter any policy whatsoever.

Alternatively, appellants contend that if Gates is found to be the "final policy-making authority," no violation

ultimately occurred because Gates' final act was to reinstate Jackson. This contention is also without merit. The fact that the arbitration board required Gates to reinstate Jackson in no way alters the fact that it was Gates and the Police Review Board who caused Jackson's constitutional injury by firing him for refusing to follow an unconstitutional order.

Appellants cite Gearhart v. Thorne, 768 F.2d 1072 (9th Cir. 1985), to support their assertion that Jackson was not entitled to damages and that reinstatement and back pay were adequate compensation because Jackson was only temporarily deprived of his property interest in his job. There, we held that the remedy of reinstatement and back pay provided by established grievance procedures fully satisfied a

state employee's action against the state under @ 1983. However, Gearhart is inapposite. Despite his First Amendment claim, Gearhart was ultimately found to have suffered no constitutional violation. He was therefore limited to the remedies provided by the grievance policy. Here, Jackson was found to have suffered a constitutional violation. This entitles him to receive damages as well as the arbitration award of back pay and reinstatement.

Appellants also cite McKinley v. City of Eloy as standing for the proposition that Jackson is not entitled to damages. This argument misapprehends our holding in that case. Although appellants correctly quote that "a person discharged for engaging in constitutionally protected activity

is entitled to reinstatement", McKinley, 705 F.2d at 1116, we went on to uphold McKinley's jury award of monetary damages for emotional pain and suffering, as well as reinstatement and back pay.

Thus, where a constitutional violation has occurred, an individual may pursue remedies beyond those provided by established grievance procedures. Under the City's Charter, the delineated procedures "shall not be construed to in any way affect any other rights any officer . . . may have to pursue or assert any and all other legal rights or remedies in relation to his office." @ 202(18). Although Jackson was ultimately reinstated, his year and one-half unemployment caused him substantial financial damage. Under @ 1983 Jackson was entitled to sue for

all consequential damages resulting from the violation of his Fourth Amendment rights.

In light of the above, the district court did not err in refusing to grant summary judgment on the issue of municipal liability.

III. Motions for JNOV, New Trial, and Directed Verdict

The district court's decision to grant or deny judgment notwithstanding the verdict is reviewed de novo. Peterson v. Kennedy, 771 F.2d 1244, 1256 (9th Cir. 1985), cert. denied, 475 U.S. 1122, 90 L. Ed. 2d 187, 106 S. Ct. 1642 (1986). We therefore apply the same standard as did the district court in considering a motion for judgment notwithstanding the verdict. Denial of such a motion is appropriate if the

evidence and its inferences, considered as a whole, and viewed in the light most favorable to the non-moving party, cannot reasonably support a judgment in favor of the moving party. The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1151 (9th Cir. 1988); Transgo, Inc. v. Ajac Trans. Parts Corp., 768 F.2d 1001, 1014 (9th Cir. 1985), cert. denied, 474 U.S. 1059, 88 L. Ed. 2d 778, 54 106 S. Ct. 807 (1986). The district court's decision to grant or deny a motion for new trial is reviewed for abuse of discretion. Hard v. Burlington Northern R.R., 812 F.2d 482, 483 (9th Cir. 1987). The standard for reviewing the district court's decision to grant or deny a motion for a directed verdict is the same as for a JNOV. Los Angeles Memorial Coliseum Comm'n v. National Football League, 791

F.2d 1356, 1360 (9th Cir. 1986), cert. denied, 484 U.S. 826, 98 L. Ed. 2d 53, 108 S. Ct. 92 (1987).

Appellants contend that the district court's denial of their motions for judgment notwithstanding the verdict, new trial, and directed verdict was improper. Prior to trial, the district court granted qualified immunity to the individual officers and Gates on the ground that the law was not clearly established in 1986 on the issue of whether one had the right to be free from compulsory drug testing in the absence of reasonable suspicion. Thus, the City contends, the jury could not reasonably have found the City liable to Jackson because the City's policy-makers were not aware that the order was unconstitutional. However, as noted above, one need not intend to

commit a constitutional tort to be held liable for the result. Further, in light of the fact that the League and the LAPD had specifically addressed the issue of drug testing in the MOU, the LAPD had notice of the appropriate standard applicable to their officers.

The jury awarded Jackson $ 154,747 for damages resulting from the City's violation of his Fourth Amendment rights due to his improper termination. The verdict was not only one that could be reached by a rational jury; it was in accord with the weight of the evidence. Accordingly, the district court did not err in denying appellants' motions for directed verdict or JNOV, and did not abuse its discretion in denying a new trial.

IV. Fifth Amendment Claim

A. Procedural Due Process Claim

Both sides agree that Jackson's procedural due process rights were not violated in this matter. He received procedural due process when his grievance was heard and addressed by neutral arbitration. Under the collective bargaining agreement in force, Jackson was entitled to reinstatement and back pay - which he received.

We have held that federal courts will accord collateral estoppel to municipal administrative hearings that have sufficient judicial safeguards.[8]

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[8]The factors used to determine the existence of these safeguards are whether an administrative agency acted in a judicial capacity and resolved disputed issues of fact properly before (continued...)

Eilrich v. Remas, 839 F.2d 630, 632 cert. denied, 488 U.S. 819, 109 S. Ct. 60, 102 L. Ed. 2d 38 (1988). Any further litigation concerning this issue would be inappropriate under the doctrine of collateral estoppel because Jackson already received the necessary opportunity for due process (i.e., he "had his day in court").[9]

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[8](...continued)
it which the parties had an adequate opportunity to litigate, and whether the general collateral estoppel criteria apply. Eilrich v. Remas, 839 F.2d 630, 632 (9th Cir.), cert. denied, 488 U.S. 819, 109 S. Ct. 60, 102 L. Ed. 2d 38 (1988).

[9]Before trial, Jackson asserted that the City was collaterally estopped from relitigating whether the City had substantial evidence of drug ingestion to order the test. The district court rejected this claim on the basis that sufficient judicial standards were not met as to that issue. At trial, this issue was litigated and resolved in favor of Jackson.

B. Substantive Due Process Claim

Prior to trial, the district court granted the City's motion for summary judgment on Jackson's Fifth Amendment substantive due process claim. Although this claim was not raised by Jackson on appeal, we requested supplemental briefing on the issue.

To support a claimed violation of an individual's substantive due process rights, we have stated that the municipality's conduct must be " 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' " F.D.I.C. v. Henderson, 940 F.2d 465, 474 (9th Cir. 1991) (quoting Lebbos v. Judges of Super. Ct., Santa Clara County, 883 F.2d 810, 818 (9th Cir. 1989)).

Here, the district court found that the City's conduct did not constitute such a violation. The City's "obey now - grieve later" policy is not constitutionally defective on its face. Further, the individual officers who gave Jackson the order were found to be immune from suit because the "law regarding urine testing for drugs was not established at the time of this alleged violation." RT at 5. Although the City was ultimately found to have violated Jackson's Fourth Amendment rights by enforcing the policy against him, it cannot be maintained that the City's actions were wholly arbitrary or unreasonable. Thus, we affirm the district court's order dismissing Jackson's substantive due process claim.

AFFIRMED.

RYMER, Circuit Judge, dissenting:

I dissent, because I believe we are bound by Los Angeles Police Protective League v. Gates, 907 F.2d 879 (9th Cir. 1990), to ask whether the City or the LAPD ever adopted a policy of carrying out unconstitutional searches of police officers, 907 F.2d at 890. Because there is no evidence that it did, there is no basis for municipal liability.

APPENDIX B

CHARTER SEC. 202.

(1) The right of an officer or employee of the Police Department to hold his office or position and to the compensation attached to such office or position is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided. No officer or employee of the Police Department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the Police Department (other than by resignation), except for good and sufficient cause shown upon a finding of "guilty" of the specific charge or charges assigned as cause or causes therefor after a full, fair and impartial hearing before the Board of

Rights (except as otherwise specifically provided in Paragraphs two (2) and seven (7) of this section). Such charges must be based upon some act committed or omitted by such officer or employee within one (1) year prior to the filing of the complaint referred to herein. No case of suspension with loss of pay shall be for a period exceeding six (6) months.

(2) Provided, however, that the Chief of Police may:

(a) Temporarily relieve from duty any officer or employee of the Police Department pending a hearing before and decision by the Board of Rights of any charge or charges pending against such officer or employee; or he may

(b) Suspend such officer or employee for a total period not to

exceed thirty (30) days with loss of pay and with or without reprimand, subject, however, to the right of such officer or employee to a hearing before a Board of Rights. In the event the officer or employee suspended under this subparagraph files his application with the Chief of Police (within five (5) days after service upon him of notice of such suspension if he has been personally served or within ten (10) days if he has been served in any other manner as herein prescribed), for a hearing before and decision by a Board of Rights in the manner in this section provided, such suspension shall thereupon automatically become a temporary relief from duty pending hearing and decision by the Board of Rights. In the event, however, that such officer or employee so suspended

under Subparagraph (b) of Paragraph Two (2) hereof, fails to so apply for such hearing within the period prescribed, he shall be deemed to have waived such hearing and such suspension shall remain effective, unless the Chief of Police required that a hearing be had, as hereinafter provided.

(3) In the event any order of relief from duty or order of suspension is made under either Subparagraphs (a) or (b) of Paragraph two (2), such order must contain a statement of the charges assigned as causes therefor, and the Chief of Police must (within five (5) days after such order of relief from duty or order of suspension is served as in this section prescribed) file with the Board of Police Commissioners a copy of a verified written complaint upon which such order of relief from

duty or order of suspension is based, with a statement that a copy of such order of relief from duty or order of suspension and copy of verified complaint was served upon the accused. Such complaint must be verified by the oath of the person making the same and must contain a statement in clear and concise language of all the facts constituting the charge made. In the event that the Chief of Police fails to file the aforesaid statement and complaint within the five (5) day period heretofore prescribed, the aforesaid order of temporary relief from duty or order of suspension shall thereupon become void and of no effect and shall be automatically revoked, and the accused officer or employee restored to duty with the department without loss of pay and without

prejudice, the same as if no order of relief from duty or order of suspension had been made.

(4) The service of any notice, order or process mentioned in this section, other than service of subpoena, may be made either by handing the officer or employee a copy thereof personally or by forwarding such copy by registered mail to his last known address of record with the Police Department if after due diligence he cannot be found.

(5) Within five days after service upon him of copy of the aforesaid verified complaint if he has been personally served or within ten (10) days after service upon him of copy of the aforesaid verified complaint if he has been served in any other manner as herein prescribed, the

accused officer or employee may file with the Chief of Police his written application for a hearing before the decision by a Board of Rights.

(6) The Board of Rights shall be constituted of three (3) officers of the rank of captain or higher. Upon the filing of the request for hearing before a Board of Rights as hereinabove provided, the officer or employee shall draw six (6) cards from a box containing the names of all of the officers who are qualified to sit upon such board (except the names of the accused, the accuser, the Chief of Police and the Assistant Chief of Police, and such other officer as may be otherwise prejudiced or otherwise disqualified by reason of being a material witness to the facts constituting the charges made), and

shall select any three (3) of the six (6) names thus drawn to constitute the Board of Rights to hear and decide upon the charges against him, rejecting the three (3) not selected by replacing them in the box. The three (3) thus selected shall constitute the Board of Rights to hear and decide the matter.

(7) In the event the accused fails, in any case, to request a hearing before a Board of Rights as hereinabove provided within the period prescribed, the Chief of Police may require a hearing to be had before a Board of Rights and may for that purpose, within five (5) days, after the expiration of such period, draw three (3) names from such box to constitute such board. Provided, however, that in any case where such Board of Rights has been constituted

for the purpose of hearing as herein in this section provided and the accused, without reasonable excuse, fails, neglects or refuses to appear before the said Board of Rights in session for such trial or hearing at the time and place designated, the Chief of Police may, at his discretion, either direct the Board of Rights to proceed with such trial or hearing in the absence of such accused, or he may, without such hearing, impose such penalty of suspension or removal as he deems fit and proper, and cause notice thereof to be served upon such officer or employee so suspended or removed in the manner herein prescribed, and file a statement of such action with the Board of Police Commissioners within five (5) days thereafter; and, provided further, however, that in the event the accused

and Chief of Police both fail to draw and create such Board of Rights within the period prescribed in any case of temporary relief from duty pending hearing, then and in that event such temporary relief from duty shall be null and void and of no effect the same as if it had not been made.

(8) Upon the selection of the officers to constitute the Board of Rights, the said Chief of Police shall appoint the time (not less than five (5) nor more than ten (10) days thereafter) and designate a place where such hearing is to be held, and shall cause notice thereof to be served upon accused in the manner herein prescribed.

The Board of Rights may at any stage of the proceedings (after it has first met in session at the time and

place designated) continue from time to time the hearing of the matter pending before them.

(9) The officers so selected as herein prescribed shall constitute the Board of Rights (for the purpose of hearing and deciding upon the matter for which it was specially drawn) and shall have the power to administer oaths and affirmations in any investigation or proceeding pending before said board, examine witnesses under oath, and compel the attendance of witnesses and the production of evidence before them, respectively, as the case may be, by subpoena to be issued in the name of the City of Los Angeles, and to be attested by the City Clerk of said City.

(10) The City Clerk shall, upon demand of the officers constituting the

said Board of Rights, issue such subpoena in the name of the City, and attest the same with the corporate seal thereof, and shall in such subpoena direct and require the attendance of the witnesses sought to be subpoenaed before the said board, at the time and place in said subpoena specified; and it shall be the duty of the Chief of Police to cause all such subpoenas to be served by some member of the Police Department upon the person or persons required to attend as aforesaid; and it shall be the duty of the Council upon the adoption of this Charter amendment to provide suitable penalties for disobedience of such subpoenas, and the refusal of witnesses to testify as herein provided.

(11) The City Attorney (or some duly authorized deputy) shall, upon

request of the Board of Rights, sit with said Board of Rights during its session or hearing for the purpose of advising the said board on any and all legal matters pertaining to this section.

(12) At such hearing the accused shall have the right to appear in person and by counsel or representative, or both, and make defense to such charge and may produce witnesses to testify in his behalf and cross-examine witnesses against him. The accused shall have the right and privilege to select and name any officer of the department of any rank not higher than the rank of Lieutenant (who is not otherwise disqualified by reason or prejudice or being a party to the action in any capacity) to act as his defense representative at such

hearing. The Chief of Police must immediately assign the officer so selected and named to act as such representative, and it is hereby made the duty of such officer to use every legal means available and exercise the best efforts of which he is capable to defend the accused at such hearing. All testimony at such hearing shall be given under oath, reported by a stenographer and transcribed and the accused shall be entitled to a certified copy of such transcript without charge or payment of fee. The said Board of Rights shall, at the conclusion of the hearing, make its specific findings of "guilty" or "not guilty" (on each specific charge) which must be based upon the evidence adduced before it at such hearing and not otherwise and render and certify its

decision in writing. If the accused is found "not guilty," said board shall order his restoration to duty without loss of pay and without prejudice, and such order shall be self-executing and immediately effective. In case, however, that the accused is found "guilty," the said Board of Rights shall prescribe its penalty (by order in writing) of either suspension of a definite period not exceeding six (6) months with total loss of pay, and with or without reprimand; or reprimand without further penalty; or of removal from office or position; which decision and order must be certified in writing and a copy thereof immediately delivered to the Chief of Police. The departmental personal history and records of the accused shall not be available to the Board of Rights except

and only in such cases where the accused has been found guilty of any charge upon which he was heard or tried by the Board of Rights, then only for the purpose of determining a proper penalty to be prescribed; provided, however, that in prescribing such penalty the said board must look to the nature and gravity of the offense of which the accused has been found guilty and may at its discretion review the departmental personal history and record of such accused; provided further however, that no item or entry in such record may be considered by the said board except in the presence of the accused, nor unless such accused has been given a fair and reasonable opportunity to explain any such item or entry.

(13) The Chief of Police shall thereafter execute the order of the Board of Rights within five (5) days after delivery to him of such certified copy of decision and order or, he may within five (5) days at his discretion and in lieu of such order, impose a penalty upon such officer of employee less in severity than that ordered by the Board of Rights, but may not impose a greater penalty. In the case of a suspension or removal, the Chief of Police shall cause a copy of his notice of suspension or removal (based upon the order of the Board of Rights or upon his modification thereof) to be served upon such officer or employee and shall file a statement of such action with the Board of Police Commissioners within five (5) days thereafter.

(14) In any case of penal suspension or removal prescribed by the Board of Rights (or by the Chief of Police in case no hearing is had before a Board of Rights) the time of such suspension shall be computed from the first day such officer or employee was so suspended or relieved from duty pending hearing before and decision by the Board of Rights and such removal shall relate back to and be effective as of the date of such relief from duty pending hearing before and decision by the Board of Rights.

(15) No officer or employee of the Police Department shall be twice tried for the same offense, except upon his request. In any case of exoneration of the accused after a hearing before the Board of Rights, such exoneration shall

be without prejudice to such officer or employee.

(16) At any time within three (3) years after any case of removal as hereinabove provided, the officer or employee so removed may file his request with the Chief of Police to be reheard or to be heard on the cause of his removal, together with his supporting affidavit specifically setting forth in clear and concise language the reasons or grounds therefor. The Chief of Police must consider and decide upon such request and affidavit within thirty (30) days after such filing. If good reason or cause appears therefor, the Chief of Police must, without unnecessary delay, cause a Board of Rights to be constituted in the manner hereinabove provided for the purpose of hearing and

deciding upon the matter. The said Board of Rights shall proceed as hereinabove prescribed, and shall at the conclusion of the hearing render and certify its findings (independent of any previous findings by any other Board of Rights, or any other court, board or other tribunal, or any investigation or report of or discretion exercised by the Chief of Police in such cases where no hearing was had before a Board of Rights), based upon the evidence adduced before it at such hearing and not otherwise; and shall make and certify its decision and order in writing, and shall deliver a copy thereof to the Chief of Police. The Chief of Police shall thereupon proceed in the same manner as is hereinabove provided for after decision by the Board of Rights.

(17) If, as and when the Board of Police Commissioners herein referred to should become abolished, then, and in that event, wherever in this section the Board of Police Commissioners is named or referred to there shall be read into this section in place thereof, the name of the officer, board or other body created in its place to assume the functions, powers and duties of such Board of Police Commissioners; or, in the absence of such specific provision, then there shall be read into this section the name of the officer, board or body to whom such powers or duties may be delegated, or who shall assume such powers or duties.

(18) This section shall not be construed to in any affect any way other rights any officer or employee may have to pursue or assert any and

all other legal rights or remedies in relation to his office or position or to the compensations attached thereto, or to appeal to or be heard or tried by or before any court or other tribunal of competent jurisdiction whether such court or other tribunal now exists or may be hereafter created or established.

(19) Any person restored to duty or reinstated in his office or position after suspension or removal, as provided in and under any provision of this section, shall be entitled to receive full compensation from the City the same as if such compensation or removal had not been made, provided that such compensation shall not be for more then six (6) months salary. (Sec. Amended 1935.)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE CITY OF LOS ANGELES,

Petitioner,

vs.

JOHNNY LEE JACKSON,

Respondent.

Supplemental Appendix to
Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY LEE JACKSON, Plaintiff - Appellee	)	No. 90-55728
	)	D.C. No. CV-87-105RSWL
v.	)	
	)	ORDER
DARYL GATES; CITY OF LOS ANGELES, Defendants-Appellants.	)	

Before: PREGERSON, Circuit Judge

The City of Los Angeles's motion to stay the mandate is hereby GRANTED. Pursuant to Fed. R. App. P. 41(b), the issuance of the mandate is stayed for thirty days from the date this order is filed. Thereafter, the mandate shall issue or the stay of the mandate shall continue as dictated by Fed. R. App. Proc. 41(b). Filed March 3, 1993

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY LEE JACKSON, Plaintiff-Appellee,	)	No. 90-55728
	)	D.C. No. CV-87-105 RSWL
v.	)	
	)	ORDER
DARYL GATES; CITY OF LOS ANGELES, Defendants-Appellants.	)	

Before: PREGERSON, CANBY, and RYMER, Circuit Judges

Judges Pregerson and Canby have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Rymer would grant the petition for rehearing but reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Filed February 19, 1993

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHNNY LEE JACKSON, Plaintiff, v. DARYL GATES; CITY OF LOS ANGELES, Defendants,	No. D.C. No. CV-87-105 RSWL ORDER

Defendants in the above captioned case have moved for a new trial pursuant to Fed. R. Civ. P. 59 or in the alternative for judgment notwithstanding the verdict pursuant to Fed. R. Civ P. 50(d). The plaintiff filed an opposition. The matter was set for oral argument on February 26, 1990 at 9:00 a.m. Attorneys for the parties presented further oral argument and responded to the Court's inquiries.

Now after having reviewed the papers and oral argument presented in support of and in opposition to the motion, the Court hereby issues the following:

Defendants' motion is DENIED.

BACKGROUND

Plaintiff Johnny Lee Jackson was a police officer with the Los Angeles Police Department. On or about February 13, 1986, another police officer, who during the trial was referred to as Officer X, came under investigation and surveillance by the Internal Affairs Division ("IAD") because his superior officer suspected him of drug use. At the time, X was a friend of Jackson's.

On February 13, 1986 the IAD observed Jackson with X travelling together in X's car to pick up a woman

while both officers were off duty. After the two officers and the woman drove to another location, Jackson remained in the car while X and the woman went into an apartment building. X returned alone shortly and the two officers then went to Jackson's home where they remained for about an hour. X and Jackson then drove in X'!s car back to the apartment building where X and the plaintiff had gone to pick up the woman. X again entered the building alone.

During the time that Jackson was alone in the car, a female undercover officer approached him and offered to share a marijuana cigarette with him. Jackson refused the offer and the undercover officer left. After X returned to the car, the two officers went back to where Jackson's car had

been left. Jackson went home alone and, along with X, did not report to work the following day.

The next week, IAD investigators observed the plaintiff in X's car at a public park. The two drank beer and talked for about an hour. Jackson then went home alone.

Between 1:00 and 2:00 a.m. the following morning, the investigators went to Jackson's home and requested that the plaintiff provide a urine sample. Jackson called the Los Angeles Police Protective League ("LAPPL") for advice. He was then transported to Parker Center where he received information from an LAPPL employee representative. Jackson was also informed by the investigators that he would be charged with insubordination and be punished if he refused to submit

to urinanalysis. Jackson still refused to provide a urine sample. The plaintiff then left Parker Center with the LAPPL employee representative.

Defendant Daryl Gates, LAPD Chief of Police, ordered Jackson to be tried by a Board of Rights. At the conclusion of that proceeding Gates ordered that Jackson be discharged. Jackson "grieved" the discharge and the Police Commission approved, ratified, and affirmed Gates' decision. On July 24, 1986, the plaintiff was removed from his position with total loss of pay and benefits.

The matter then went to an arbitrator pursuant to state law. The arbitrator determined that the City had not complied with Article 37 of the Memorandum of Understanding ("MOU"), which required that there must be

substantial evidence to indicate that an employee had ingested illegal substance before ordering him to provide a urine sample. The plaintiff was reinstated with backpay and benefits, less interest, on December 1, 1987 pursuant to the arbitrator's order.

The plaintiff had filed suit on February 17, 1987, prior to the arbitrator's order. The jury trial was commenced on September 6, 1989.

On September 14, 1989, a jury verdict for plaintiff was returned awarding him $154,747.00 for infringement of his 4th Amendment rights. This Court granted defendants' motion brought pursuant to Fed. R. Civ. P. 60(b) on November 29, 1989 to allow the present motion to be filed.

DISCUSSION

I. Bases for new trial

A. Alleged erroneous jury instructions on reasonableness

The defendants argue that the Court's instructions to the jury are erroneous because the instructions (i.e., Nos. 44, 45, and 45.1) state that there must be "an individualized, articulated, reasonable suspicion" before a search can be lawfully compelled. The defendants contend that the U.S. Supreme Court cases of National Treasury Employees Union v. Von Raab, ___U.S.___, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), ("Von Raab") and Railway Labor Executive's Association v. Skinner, ___U.S.___, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ("Skinner") establish that probable

cause requirements are not prerequisite to lawful searches in the form of urinanalysis testing if the governmental interest is great enough. Thus, the defendants contend that a proper analysis in determining whether a search is lawful pursuant to the Fourth Amendment includes a balancing test between the governmental interests served by a urinanalysis test and a government employee's privacy interest. The Court denied the inclusion of the defendants' proposed jury instructions which would have instructed the jury to apply this balancing test (i.e., Proposed Jury Instructions Nos. 101, 103, 109, and I11, hereinafter referred to collectively as "the balancing test instructions")

The Court's refusal to include the balancing test instructions is

consistent with its previous order which denied defendants' summary judgment motion based on this same argument. In the Court's July 31, 1989 order denying defendants' summary judgment motion, the Court distinguished the searches in Von Raab and Skinner from the one in the present case by noting three particular factors: (1) the government demonstrated a compelling state interest; (2) the policies were calculated to minimize the intrusive nature of the suspicionless search and to preserve the dignity of employees subject to testing, achieved primarily by giving notice to affected employees; and (3) the testing procedures were "triggered" by an objective factor (e.g. promotion, or a railway accident).

The defendants point out that a recent Appeals Court decision which interprets Von Raab and Skinner, National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989) ("Cheney) does not limit the two Supreme Court case to such narrow readings. Cheney upheld Army personnel regulations which allowed random drug testing for particular classes of military personnel. The D.C. Circuit's opinion rejected the proposition that the analyses in Skinner and Von Raab were inapplicable to its case because the testing procedure considered in the two Supreme Court cases were conducted on a post-accident, or pre-ascension basis while the Army's regulations allowed for purely random testing. Id. at 609. The Cheney court therefore applied the balancing test outlined in

Skinner and Von Raab in determining whether a random urinanalysis "search" allowed by the Army's regulations was "reasonable" in light of the Fourth Amendment. See also Harmon v. Thornburah, 878 F.2d 484 (1989).

The plaintiff initially responds to this argument by contending that the regulations considered in Cheney do not really call for "random" testing. The plaintiff notes that the regulations quoted in the opinion also called for the testing procedures to be conducted on pre-ascension, post-accident, and probable cause bases. 884 F.2d at 605. Jackson reasons that there would be no reason to continue to require probable cause for some tests if purely random testing was allowed, and thus the stated random testing is not purely

random testing, but involves some type of suspicion basis.

This argument fails for several reasons. The opinion notes that the language of the regulations had been altered from "periodically . . . on the basis of neutral criteria" to "periodically on a random basis." 884 F.2d at 606 fn. 3. Thus, the intent to allow random testing is fairly evident. In addition, the D.C. Circuit's discussion of the federal employees' argument against the policies makes it clear that the federal employees found the policies offensive because of the allowance of randomness. 884 F.2d at 608-09. Lastly, plaintiff's argument relies on consistent reasoning throughout governmental regulation, and this cannot be safely presumed.

However, the D.C. Circuit's application of the Von Raab/Skinner analysis in determining whether the random searches were allowable under the Fourth Amendment is still not dispositive of the issue of this Court's alleged error in jury instructions. In each of these cases, a general scheme of suspicionless searches was analyzed through a balancing test of governmental interest versus individual privacy rights. The defendants have maintained throughout this case that Jackson was not subjected to a random testing program, but was forced to submit to a urinanalysis test based on "some individualized suspicion." Def. Memo, p. 9, In. 11. Thus, it would seem that the defendants recognize that random testing is distinguishable from

suspicion-based testing. Yet after making this distinction, the defendants argue that the Court should have instructed the jury to apply the balancing test in determining whether the suspicion reached the level of "reasonable." Def. Memo, p. 9 In. 12-16.

The Court should have properly instructed the jury about governmental interests and the balancing test if the jury was asked to determine whether procedures that allowed suspicionless 4th Amendment searches were reasonable. In this case, however, the Article 37 of the MOU and the LAPD Manual § 3/836.05 required an officer to submit to urinanalysis testing only when there were objective symptoms of being under the influence or substantial evidence to indicate

ingestion or absorption. In other words, the applicable regulations required a suspicion basis for a urinanalysis search. As discussed above, the defendants have concurred that the search of Jackson was done because of individualized suspicion. The jury was properly informed about the MOU and LAPD Manual regulations. Jury Instruction 88(u).

In sum, two different analyses apply when determining the reasonableness of a urinanalysis drug testing. When the questioned policy allows for suspicionless searches, then a determination of the reasonableness of the policy requires the application of the Von Raab/Skinner balancing test. By contrast, when the applicable policies require suspicion before allowing a urinanalysis testing, then

determining the sufficiency of the suspicion requires evaluation of whether it was an individualized, articulable, reasonable suspicion.

The Supreme Court has not articulated this distinction. However, the facts in Von Raab, Skinner, Cheney, and Thornburgh present this important factual distinction of 4th Amendment search schemes which were questioned for their lack of a suspicion requirement. Since the present case involves a suspicion based search of an individual as opposed to a random department-wide search, the standards for reasonable suspicion which existed prior to Von Raab and Skinner would still be the correct law for this case. Thus, the Court's instructions were not erroneous.

The Court does not find Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987), to be persuasive authority in this case. The Eleventh Circuit, in a factual situation similar to the present one, noted the government's compelling interest as well as the individualized suspicion in affirming a summary judgment for the reasonableness of a particular search. Id. at 1511. However, the Court did not hold that these were all necessary considerations in the analysis for determining whether an individual search is reasonable.

B. Alleged instructional error for municipal liability

The defendants contend that the Court erred in its jury instructions regarding municipal liability because the temporary property deprivation

caused by the termination was not a constitutional tort. Furthermore, the defendants argue that municipal liability can only stem from the actions of one with final policy making authority. Pembaur v. City of Cincinnati, 475 U.S. 483, 106 S.Ct. 1292, 1299-1300 (1986).

The defendants' first argument seems to be a misconstruing of the plaintiff's claim for relief. Jackson sought damages from the deprivation of his fourth amendment rights to only be subject to a reasonable search. Termination and the resulting injuries incurred (besides backpay) were consequential to both the constitutional torts for the jury-determined unreasonable search, and the "obey now-grieve later" policy of the City. Thus, the legal conclusion that

the temporary property deprivation suffered by plaintiff did not amount to a constitutional injury since he was eventually restored is not applicable in this case.

The defendants' second argument has good legal foundation, but similarly fails because of a misinterpretation of the plaintiff's claim for relief. The defendants correctly note that Pembaur requires that municipal liability requires the action of an official with final policy making authority regarding that action, and that state law determines whether an official has final policy making authority. 106 S.Ct. at 1300. In addition, the defendants cite L.A. Police Protective League v City of Los Angeles, 163 Cal.App.3d 1141, 1146, 209 Cal.Rptr. 890, 892 (1985) as authority

for the proposition that the arbitrator has been given the power to resolve the dispute over the authority of the City to discharge the plaintiff.

However, again the defendants focus on the termination as being the constitutional injury. Plaintiff's claim is for the injury incurred due to the violation of his 4th Amendment rights. When Jackson refused to submit to what he believed to be an unlawful search, he ran against the LAPD's "obey now-grieve later" policy. His termination resulted from violating this policy (i.e., insubordination). Gates, who the defendants admitted had policy-making authority, acted in response to the "obey now-grieve later" policy. Though this policy itself is not unconstitutional, the fact that it causes a constitutional deprivation is

what is important. McKinley v. City of Eloy, 705 F.2d 1110, 1117 (9th Cir. 1983).

In addition, L.A. Police Protective League does not hold that the arbitrator is the official with the final policy making authority in regards to suspension and termination. It does uphold the arbitrator's power to resolve such disputes. However, arbitration is a process beyond the policy making powers of the police administration, and the arbitrator is not a City official.

Thus, the Court's instructions requiring a finding of municipal liability if the search were found to be unreasonable are not erroneous.

II. Bases for judgment n.o.v.

A. The undisputed facts allegedly show that the search was reasonable as a matter of law.

Defendants next claim that even accepting the standards required by the Court's instructions that the facts demonstrate that the search was reasonable. After recounting the evidence that was presented at trial regarding the basis of the defendants' suspicion of Jackson, the defendants assert that the suspicion was individualized, articulable, and reasonable.

Though the suspicion of Jackson was individualized in the sense that he was not merely one of a class of individuals, none of the bases for

suspicion actually linked the plaintiff with use of a drug. The investigators who ordered Jackson to submit to a urinanalysis test did not even have direct evidence of Jackson's usage of drugs that was old, or of little credibility. Since consideration of a judgment n.o.v. involves looking at the facts in the light most favorable to the prevailing party, the facts could be said to show that the investigators acted with unreasonable suspicion since Jackson's actions could have been viewed as being purely legal.

B. The undisputed facts allegedly show that municipal liability was not incurred

Defendants have also requested a judgment notwithstanding the verdict on the issue of municipal liability. In

essence, the defendants have rehashed the same argument made in their request for a new trial due to alleged erroneous jury instructions on municipal liability. Thus, the Court refers to its discussion in Section I. B. of this order in denying the defendants' motion for judgment n.o.v. on the basis of municipal liability.

III. CONCLUSION

For the foregoing reasons, defendants' motion for new trial or, in the alternative, judgment notwithstanding the verdict are DENIED.

IT IS SO ORDERED.

DATED: APRIL 23 1990

RONALD S. W. LEW

United States District Judge

CV 87-1085 RSWL Jackson v. Gates et al.
Defendant's motion for new trial or in the alternative for judgment notwithstanding the verdict.

Filed April 24, 1990

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHNNY LEE JACKSON, Plaintiff, v. DARYL GATES; CITY OF LOS ANGELES, Defendants.	No. D.C. No. CV-87-105 RSWL ORDER

On June 13, 1989 defendants Daryl F. Gates and the City of Los Angeles ("Gates") filed a second motion for summary judgment in the above captioned action. Plaintiff Johnny Lee Jackson ("Jackson") timely filed opposition and Gates filed a reply. The motion was originally scheduled for hearing on July 17, 1989 but was removed from the Court's law and motion calendar for

disposition based on the papers pursuant to Fed. R. Civ. p. 78.

Now, having read and considered the papers filed both in support of and in opposition to the motion, the Court hereby DENIES Gates' Motion for Summary Judgment.

Gates seeks summary judgment on the sole issue remaining in the case: whether the order to Officer Jackson to submit to a urine test was reasonable under the Fourth Amendment.[1] In Gates' first motion for summary judgment this Court made findings of uncontroverted fact which stand unchanged: Gates now submits no new facts or evidence. Rather, Gates

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[1]On July 19, 1988 this Court granted summary judgment in favor of Gates on all but one of the federal claims and on all of the pendant state claims brought by Jackson.

suggests that two recent Supreme Court decisions, National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989), and Skinner v. Railway Labor Executives' Assoc., 109 S.Ct. 1402 (1989), alter the reasonableness requirement of the Fourth Amendment such that, based on the Court's previous findings of fact, Gates is entitled to judgment as a matter of law.

Jackson claims that his Fourth Amendment right to be secure against unreasonable searches and seizures was violated when the Los Angeles Police Department ("LAPD"), without reasonable suspicion, ordered him to submit to a urine test and then fired him when he refused. Summary judgment on this issue was previously denied Gates because the Court found that a genuine

issue of material fact existed as to whether the LAPD had acted with reasonable suspicion. See Railway Labor Executives' Assoc. v. Burnley, 839 F.2d 575 (9th Cir. 1988) (called into question by Von Raab and Skinner, supra). The question before the Court now is whether, viewing the facts of this case in light of Van Kaab and Skinner, the Fourth Amendment permitted the LAPD to act only upon reasonable suspicion, or whether overriding governmental interests relaxed the operative standard to something less than reasonable suspicion.

In Von Raab the Supreme Court "reaffirm[ed] the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of

reasonableness in every circumstance." 109 S.Ct. at 1390. At times, the Government's needs may be "sufficiently compelling to justify the intrusion on privacy entailed by conducting . . . searches without any measure of individualized suspicion." Von Raab, 109 S.Ct. at 1392. In both Von Raab and Skinner, suspicionless searches in specific context were upheld.

In Von Raab, the Supreme Court held that suspicionless drug testing of all persons seeking promotion in the United States Customs Service to positions which involve narcotics interdiction and/or firearm handling is constitutional. In Skinner, suspicionless drug testing of railway employees who are involved in certain kinds of accidents or rule violations

was held constitutional.[2] Several factors essential to the holdings in Von Raab and Skinner are relevant in deciding Gates' second motion for summary judgment.

First, in both Von Raab and Skinner the Government demonstrated a compelling interest in ensuring that affected employees be drug-free. For example, "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety . . . 'presents "special needs" beyond normal law-enforcement that may justify departures from the usual warrant and probable-cause requirements.'" Skinner, 109 S.Ct. at 1414 (citing

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[2]The drug testing policies contemplated in Skinner are subject to Fourth Amendment constraints because they are either mandated or authorized by the Federal Railroad Administration.

Griffin v. Wisconsin, 107 S.Ct. 3164, 3168 (1987)). Similarly, within the Customs Service "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." Von Raab, 109 S.Ct. at 1393. When the Government's interest is sufficiently strong, the individual's right to privacy usually reflected in warrant and probable-cause requirements may hold less tenaciously.

Second, although in each case the Government's security interest was held to outweigh the individual's privacy interest, the drug policies scrutinized in Von Raab and Skinner are calculated to minimize the intrusive nature of the suspicionless search and to preserve the dignity of employees subject to testing. This is achieved primarily by

giving notice to affected employees. In Von Raab, for instance, the drug testing is in effect consensual: employees may choose whether or not to apply for promotion and are aware that a drug screen is part of the application process.[3] In Skinner, railway employees are fully apprised of the conduct and occurrences which lead to testing.

Third, and perhaps most importantly, in the drug policies contemplated in Von Raab and Skinner employees are "simply not subject 'to the discretion of the official in the

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[3]In Von Raab, United States Customs Service employees were also held to have "a diminished expectation of privacy in respect to the intrusions occasioned by a urine test' because "employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." 109 S.Ct. at 1394.

field.'" Von Raab, 109 S.Ct. at 1391 (citing Camara v. Municipal Court, 387 U.S. 523, 532 (1967)). In each case, objective factors (e.g., a promotion, an accident) "trigger" the drug testing procedure. There is little place for discriminatory or arbitrary abuse of authority by the state.

Gates urges this Court to hold the conduct of the LAPD in Jackson analogous to the policies upheld in Von Raab arid Skinner. The Court, however, is unable to stretch so far. Even if the Government has a compelling interest in ensuring a drugfree police force, the amount of police discretion at issue in Jackson clearly distinguishes this matter from the limited scenarios of Von Raab and Skinner. In Jackson, there is no objective deterrent available to

prevent state abuse of discretion. The police in Jackson, after observing certain of their colleague Jackson's activities, formulated an individualized suspicion which led them to order Jackson to submit a urine sample. Gates has failed to identify in such conduct any limiting principle (for example, an objective "triggering" factor such as a promotion application or specific rule violation) which could serve to curb the authority of the police. In Jackson, the potential for police abuse and concomitant threat to individual privacy rights are strong enough that they cannot withstand an abrogation of the Fourth Amendment requirement of reasonable suspicion.

For the foregoing reasons the Court is unable to conclude that the decisions of the Supreme Court in Von

Raab and Skinner entitle Gates to summary judgment as a matter of law. As a result, there remain genuine issues of material fact pursuant to the previous denial of summary judgment.

Gates' request for certification for interlocutory appeal is DENIED.

IT IS SO ORDERED.

DATED: July 31,1989

RONALD S. W. LEW
United States District Judge

CV 87-1085-RSWL, Jackson v. Gates,
Second Motion for Summary Judgment and
Request for Certification for
Interlocutory Appeal.

Filed July 31, 1989

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHNNY LEE JACKSON, Plaintiff,	No. D.C. No. CV-87-105 RSWL
v.	ORDER
DARYL GATES; CITY OF LOS ANGELES, Defendants,	

Defendants City of Los Angeles and Daryl F. Gates, Robert Gil, Richard Bonneau, Barry Morrison, and Steve Murphy filed a motion for summary judgment scheduled for hearing on October 31, 1988. Plaintiff Johnny Lee Jackson also filed a motion for partial summary judgment or summary adjudication of issues scheduled for hearing on the same date. After oral argument for both motions, the Court

requested further briefing from the parties. Plaintiff was to submit his briefs on November 30, 1988 and defendants were to submit their opposition by December 14, 1988. Plaintiff's reply was due on December 21,1988.

On December 21, 1988, the Court took the matter under submission for disposition on all of the papers filed in support of and in opposition to the motions, oral argument presented at hearing, and all of the information contained within the additional briefs. The defendants' and plaintiff's motions contain and address both similar and identical issues. Accordingly, in effort to avoid repetition, the Court addresses both of the pending motions through this Order. After careful

consideration, the Court hereby issues the following:

Defendants' motion for summary judgment is granted in part and denied in part. Plaintiff's motion for partial summary judgment or summary adjudication of issues is denied.

Defendants contend that the uncontroverted facts disclose no unconstitutional municipal policy. This matter deals with Article 37 of the Memorandum of Understanding ("MOU") between the City of Los Angeles and the Police Protective League the authorized bargaining agent for the police officers. Defendants allege that there is no evidence that suggest this particular MOU is a policy or custom that deprives fourth amendment rights. A municipal body can be sued directly under 42 U.S.C. § 1983 for monetary

relief where the unconstitutional action implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The burden of proving that such a policy exists rests on the party who makes that assertion. St. Louis v. Praprotnick, 485 U.S., 108 3 S.Ct. 915, 926, 99 L.Ed.2d 107, 121 (1988). There must also be a causal relationship between the policy and the claimed deprivation. City of Oklahoma City v. Tuttle, 471 U.S. 808, 817, 61 105 S.Ct. 2427, 85 L.Ed.2d 791, 800 (1985), reh'g. denied, 473 U.S. 925, 106 S.Ct. 16, 87 L.Ed.2d 695 (1985).

Plaintiff makes the argument that he was removed solely because he failed

to submit to an unreasonable search. The policy plaintiff complains of is the "obey now - grieve later" portion of the insubordination policy. In this circuit, a policy itself need not be unconstitutional, it need only cause a constitutional violation. McKinley v. City of Eloy, 705 F.2d 1110, 117 (9th Cir. 1983).

The Supreme Court in Monell stated that " . . . Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." Monell at 692. Plaintiff claims that the constitutional tort in this matter was the alleged violative order to be searched, which was the proximate cause of plaintiff's removal. As stated in McKinley, supra, even though a removal

order based on insubordination was not constitutionally wrong, it caused a constitutional violation in deprivation of plaintiff's rights. Accordingly, in this instance it is possible for the City of Los Angeles to be liable for causing a constitutional violation, even if the insubordination removal policy was constitutional. Defendant Gates contends that there are no facts or allegations that connect him to the order to plaintiff to submit to a urine test and therefore he had nothing to do with plaintiff's alleged constitutional deprivation. In discharging plaintiff, Gates acted as the policy making official of the city. Municipal liability attaches where the unconstitutional deprivation is the result of an act within the authority of policy making official of the city.

See Los Angeles City Charter, §§ 78, 80, 198, 199, and 202. Furthermore, the duration of the constitutional deprivation of plaintiff's fourth amendment rights, if such deprivation occurred, is a question of fact. Cf. Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987) 5 (where the court noted that the plaintiff's continued employment as a municipal fireman was contingent upon his subjection to an administrative investigation and, therefore, it was necessary to examine whether the "search" offended the fourth amendment). In following, it is possible that Jackson's refusal to submit to a urinalysis would have, and could have, culminated in his suspension from the police department. Therefore, the policy of suspension for refusing to submit to such a test is a

part of the policy which the plaintiff alleges is an unreasonable search and seizure. In accordance with Monell, defendant Gates cannot be excluded as a defendant. The individual defendants contend that they are entitled to qualified immunity and, therefore, they are entitled to summary judgment. Where one's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know, then qualified immunity will attach. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). Police officers are entitled to this type of immunity. See Pierce v. Ray, 386 U.S. 547, 557, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288, 296 (1967).

Individual defendants contend that the law regarding urine testing for

drugs was not established at the time of this alleged violation. If controlling law is not clearly established, a reasonable person would not be expected to know how to structure his conduct in order to avoid liability and in such instance, a defendant will be immune from suit. Todd v. U.S., 849 F.2d 365, 368-9 (9th Cir. 1988). Plaintiff cites to approximately two pages of cases in their opposition stating that there is a clear standard regarding public employee drug testing. However, all of the cases cited to were decided in 1986 or afterwards. The pertinent incident, in this matter,occurred in February 1986. Accordingly, plaintiff's attempts to prove the existence of controlling law is unpersuasive. Plaintiff further counters that there

was no "reasonable individualized and articulated suspicion" and, therefore, the individual defendants should have known their acts were wrong. However, where officials are sued for constitutional violations, they do no lose their qualified immunity because their conduct violates some statutory or administrative provision. Davis v. Scherer, 468 U.S. 183, 194, 104 S.Ct. 3012, 3019, 82 L.Ed.2d 139, reh'g. denied, 468 U.S. 1226, 105 S.Ct. 26 (1984). Accordingly, the individual defendants are entitled to summary judgment as they are immune from the alleged liability of their acts. Plaintiff contends that the order to him to submit to the urinalysis was not supported by a "reasonable individualized and articulated suspicion" that the test would show

evidence of drug use. The standard for compelling or mandating a public employee to submit to an observed urinalysis is met whether there exists a "reasonable individualized and articulated suspicion" of drug use, impairment or ingestion. Railway Labor Executives' Association v. Burnley, 839 F.2d 575 (9th Cir. 1988), cert. granted, 108 S.Ct. 2033, 100 L.Ed.2d 618 (1988). This is not disputed by the parties. However, the Court has previously addressed this identical issue in the Order of July 19, 1988. Plaintiff next contends that summary adjudication should be granted on the basis that a municipal policy operated to deprive plaintiff of his constitutional rights, namely the fourth amendment, and that, therefore the City of Los Angeles is liable for

the discharge of plaintiff. As stated above, the Court finds that there is a triable issue of fact. Plaintiff's argument that the individual defendants are not entitled to claim the qualified immunity defense has been addressed hereinabove.

Last, plaintiff argues that defendants are collaterally estopped from relitigating whether they had substantial evidence of ingestion to order the test. Plaintiff relies upon the fact that the arbitrator, who was fully empowered to conduct a hearing de novo did not take in such evidence because the parties stipulated to the arbitrator's review of the transcript and exhibits of the Board of Review. In Elrich v. Remas, 839 F.2d 630, cert. denied, 102 S.Ct. 60, 102 L.Ed.2d 38 (9th Cir. 1988), the Ninth Circuit held

that federal courts would accord collateral estoppel to municipal administrative hearing that have sufficient judicial safeguards. An examination was made to determine whether collateral estoppel should apply in People v. Sims, 32 Cal.3d 468 (1982). The Court examined the following factors in Sims:

1. Whether an administrative agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate;

2. Whether the general col lateral estoppel criteria apply.

At the administrative hearing in Elrich, supra, both parties were represented by counsel, twenty-one sworn witnesses testified, subpoenas were issued and both parties presented oral argument and written memoranda. The Ninth Circuit in Guild Wineries and Distilleries v. Whitehall Co., 853 F.2d 755 (9th Cir. 1988) noted that res judicata applied to judicial proceedings when the administrative agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. In those instances, courts should not hesitate to apply res judicata. Id. at 759.

There is a fundamental difference in the facts before this Court. Before the arbitrator below, no live evidence

heard and considered since the parties stipulated to the record from the Board of Review. Furthermore, the arbitrator was determining whether the order was reasonable in light of the policy of the Los Angeles Police Department's policy, not whether it was reasonable under the fourth amendment.

Therefore, the arbitrator addressed a different issue from this Court and collateral estoppel will not apply.

IT IS HEREBY ORDERED:

The individual defendants are entitled to qualified immunity and accordingly, they are entitled to summary judgment. The remainder of defendants' motion for summary judgment is denied. Plaintiff's motion for summary judgment is denied. As the trial date for this matter was

previously vacated, the status conference is set for March 27, 1989 at 9:00 A.M. before this Court. In light of the recent U.S. Supreme Court's decisions regarding drug testing of government employees, counsel should be prepared to discuss the impact those decisions have on this matter.

DATED: March 22, 1989

RONALD S. W. LEW
United States District Judge

Filed March 22, 1989

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHNNY LEE JACKSON, Plaintiff, v. DARYL GATES; CITY OF LOS ANGELES, Defendants,	No. D.C. No. CV-87-105 RSWL ORDER

Defendant filed a motion for summary judgment that was set for hearing on May 23, 1988. After listening to oral argument on that date, the Court took this matter under submission. Having read and considered all of the papers filed in support of and in opposition to said motion, as well as all of the pleadings on file with the Court and the oral arguments

offered by the parties, the Court issues the following ruling.

Defendants' motion is denied in part and granted in part.

The Court finds the existence of a triable issue of material fact as to whether the order to Officer Jackson to submit to a urine test was reasonable. As the Ninth Circuit recently reiterated in Railway Labor Executives' Assoc. v. Burnley, 839 F.2d 575 (9th Cir. 1988):

> "(P)ublic employer intrusions on the constitutionally protected privacy interests of government employees for work-related purposes and for investigations of work-related misconduct should be judged by a standard of

reasonableness under all circumstances." Id. at 582 (citing O'Connor v. Ortega, ___U.S.___, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).

This question, in light of the record before the Court, raises a triable issue of material fact, and thus, cannot be decided by summary judgment. The fact that plaintiff refused to comply with the order to take the urine test does not negate the possibility that his fourth amendment rights may have been violated. A violation can exist even where the search is not made, when refusal to comply carries the consequence of lossing (sic) one's job. Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). Accordingly, the Court rejects

defendants' unsupported assertion to the contrary.

However, aside from the questions of fact remaining with regard to plaintiff's alleged deprivation of his fourth amendment right to be free from unreasonable search and seizure arising from the order to submit to the urine test, the Court finds no controverted issues of material fact with respect to the other constitutional deprivations alleged by plaintiff and grants a partial summary judgment in favor of defendants as to them pursuant to the accompanying Findings of Uncontroverted Facts and Conclusions of Law signed by the Court and filed herewith.

As to plaintiff's pendent state claims, the Court exercises its sound discretion and dismisses them based on

its finding that these state claims would tend to predominate over the remaining federal claim in terms of proof, scope of the issues raised, and comprehensiveness (sic) of the remedies sought, and the further finding that inclusion of these state claims would unduly prolong the trial. United Mine Workers v. Gibbs, 383 U.S. 715, 733, 16 L.Ed.2d 218, 232, 86 S.Ct. 1130 (1966).

Accordingly, the Court HEREBY DENIES defendants' motion as to plaintiff's 42 U.S.C. § 1983 claim based upon a deprivation of plaintiff's fourth amendment rights to be free from unreasonable search and seizure arising from the order that he submit to a urine analysis test.

IT IS FURTHER ORDERED that partial summary judgment on the remaining issues with respect to all other

constitutional deprivations alleged by plaintiff is HEREBY GRANTED.

IT IS FURTHER ORDERED that plaintiff's pendent state claims are HEREBY DISMISSED without prejudice.

IT IS SO ORDERED.

DATED: 7-15-88

RONALD S. W. LEW
United States District Judge

Filed July 19, 1988

Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1645

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE CITY OF LOS ANGELES,
Petitioner,
vs.
JOHNNY LEE JACKSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this matter, the Court of Appeals' decision is consistent with the framework developed by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) and *City of St. Louis v. Praprotnick*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), and creates no conflicts among the lower courts.

2. The holding that a police employee may not be constitutionally discharged for exercising his Fourth Amendment rights is consistent with this Court's decisions and creates no conflict among the lower courts.

3. The Court of Appeals' decision is consistent with the framework developed by this Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 S.Ct. 1384, 103 L.Ed.2d 685 (1989) and *Railway Labor Executives Association v. Skinner*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), and creates no conflict among the lower courts.

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No. 92-1645

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE CITY OF LOS ANGELES,
Petitioner,
v.
JOHNNY LEE JACKSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Johnny Lee Jackson was a regularly-appointed member of the Los Angeles Police Department, who could be discharged only "for cause" under City Charter Section 202 when, on February 21, 1986, at about 1:30 a.m., Internal Affairs Division ("IAD") officials arrived unannounced at Jackson's home when Jackson was asleep, and demanded that he submit to urine testing immediately because he was suspected of ingesting cocaine.

IAD officials who were surveilling the target of the investigation, Officer John Leach, had seen Jackson in the company of Leach on two occasions on February 13 and 20, 1986, after the two left work at Southwest Area Station together. On the first occasion, while Jackson waited in the car, Leach went into two different large apartment houses suspected to be "narcotics locations". Jackson was never a target of the investigation, but since he was in the company of Leach (who was suspected of using cocaine), IAD officials wanted a sample from Jackson to determine whether he was also possibly using cocaine.

After some discussion at Jackson's home, the IAD officials took Jackson against his will to Parker Center, some 25 miles away, for the sole purpose of obtaining the urine sample. There, Jackson refused to comply with the order, relying on a Department rule that "substantial evidence" of ingestion must exist before an employee can be ordered to supply a testing sample in these circumstances.

Jackson was charged only with insubordination for refusing the order and was discharged by Chief Gates. Jackson was never accused of being involved in drug use or possession in connection with these circumstances.

Jackson utilized the grievance procedure and after a hearing on the merits, an independent neutral ordered Jackson reinstated with full back-pay and benefits (about 1-1/2 years after the discharge) because investigators did not have substantial evidence of drug use or involvement.

Jackson sought further relief in the District Court in a lawsuit under 42 USC Section 1983, which was tried to a jury. A verdict was returned in favor of Jackson against Chief Gates and the City of Los Angeles.

The jury was instructed that an officer could not constitutionally be discharged for refusing to obey an unconstitutional order.

In the Court of Appeals, Jackson's judgment was affirmed on the basis that the Fourth Amendment may be violated where the discharge is based upon an order which is contrary to the protections of the Fourth Amendment, and on the basis that Gates, in acting to discharge Jackson, and as the final policymaker under local law, subjected the City to liability under Section 1983.

Petitioner's request for rehearing and rehearing *en banc* were denied.

This petition follows.

REASONS FOR DENYING THE WRIT

I.

IN THIS MATTER, THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE FRAMEWORK DEVELOPED BY THIS COURT IN *PEMBAUR V. CITY OF CINCINNATI*, AND *CITY OF ST. LOUIS V. PRAPROTNICK*, AND CREATES NO CONFLICTS AMONG THE LOWER COURTS.

A. PETITIONER DOES NOT CLAIM THAT THE COURT OF APPEALS' DECISION CREATES A CONFLICT AMONG THE CIRCUITS.

Petitioner's brief nowhere alleges that this Court of Appeals decision creates a conflict among the circuit courts with respect to the holding that Chief Gates acted as a final policymaker in his decision to discharge Officer Jackson from police employment. Hence, there is no reason for this Court to grant the petition on this point. Moreover, as appears below, the decision correctly follows this Court's holdings on the subject.

B. THE COURT OF APPEALS PROPERLY DECIDED THE CASE UNDER THE *PEMBAUR* AND *PROPRATNICK* DECISIONS.

1. The holding in *Praprotnick* -- whether under state law, Chief Gates was the official with final policymaking authority -- was correctly applied to the facts in this case.

In *City of St. Louis v. Praprotnick*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 108 (1988), this Court held that the question of whether an official was clothed with final policymaking authority is to be determined by reference to the applicable provisions of state law. There is no dispute that the applicable state law -- the charter of the City of Los Angeles -- vests Chief Gates with final policymaking authority in matters of the discipline of police officers generally, and in particular, in regard to decisions to discharge them from employment. Accordingly, the Court of Appeals decision follows *Praprotnick* and there is no reason for review of the decision on that point.

2. The Doctrine of *Respondeat Superior* plays no role in the decision of this case.

Contrary to petitioner's assertions, the Court of Appeals opinion constitutes neither a reintroduction of *respondeat superior*, nor an incorrect application of the plurality holding in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). After all, it is not disputed that Chief Gates is the City official with final policymaking authority over the discipline of police officers. As such, his decisions *are those of the City*. Likewise, a suit against a policymaker in his official capacity is nothing more than an action against the City itself. In these circumstances, the doctrine of *respondeat superior* is not implicated. *Pembaur*, 475 U.S. at 481.

There was a "policy" involved in this case. The "obey now--grieve later" rule requires Los Angeles officers to obey orders of their superiors (in our case, to submit to suspicion-based, compelled urinalysis) or face the lash of administrative discipline. The only recognized exceptions to the rule are where the order requires the recipient to commit an unlawful act, perform an immoral act, or

unreasonably endanger someone's safety. Chief Gates' position throughout this action has been consistent: since the order to Jackson involved none of the three exceptions, his *duty was to obey* and seek relief through the grievance procedure -- *after* surrendering his Fourth Amendment rights.

As the Court of Appeals noted, no one claims the City has a policy of requiring employees to submit to unconstitutional searches. Nevertheless, the insubordination rule described above requires unquestioning obedience to "lawful" orders. Even if it develops that the order is unconstitutional, the employee who chooses to disobey, does so at his peril.

C. THE COURT OF APPEALS DECISION CONSTITUTES A FACT-SPECIFIC DETERMINATION UNDER *PRAPROTNICK* AND THEREFORE DOES NOT WARRANT REVIEW.

Petitioner attempts to distinguish this case, where the insubordination policy and the Memorandum of Understanding provisions on suspicion-based drug testing were in place, from a hypothetical situation where a final policymaker acts in a circumstance when there is no policy one way or the other. There is no distinction. Where a final policymaker inflicts a constitutional injury, it makes no difference whether his act is a mistaken attempt to apply existing rules, or an isolated act carried out where no rules govern. The constitutional harm is inflicted by the municipality, since the act is that of the entity itself.

For support of this perceived distinction, petitioner quotes from *Pembaur*, 475 U.S. at 482-483 (see petitioner's brief at pp. 21-23). The passage selected by

petitioner omits the all-important sentence which immediately follows:

> The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Since Chief Gates is the official responsible for establishing final City policy respecting the discipline of police officers, the Court of Appeals decision is in accord with the *Pembaur* plurality opinion.

At 475 U.S. at 483, this Court said:

> We hold that municipal liability attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final government policy respecting such activity before the municipality may be held liable. fn. 12.

In applying *Pembaur* and *Praprotnick*, the Court of Appeals determined under the isolated and specific facts of this case, that Gates acted with final policymaking authority vested in him by local law, in deciding to discharge Jackson.

High ranking government officials normally and routinely perform discretionary acts within circumstances where there are policies, regulations and other government restrictions in place. Every such act can be linked to some identifiable source of policy. Petitioner's assertion that a final policymaker's act can create municipal liability only

when he acts in an area where no policy is present -- thus by his act making policy -- world be a rare, if not impossible occurrence. Petitioner's view, if adopted, would create an exception in every case that would swallow up the rule that a final policymaker's unconstitutional act within his area of final policymaking authority creates municipal liability. No case supports this view.

Petitioner's discussion of footnote 12 is also flawed, by omission of the clarification that if the hypothetical sheriff did have final policymaking authority over county sheriff employment policy, his discretionary decisions respecting hiring and firing *would represent county policy and would give rise to entity liability*. Again, the Court of Appeals' disposition of this matter correctly follows *Pembaur*.

Accordingly, on these points, the decision does not merit review.

II.

THE HOLDING THAT A POLICE EMPLOYEE MAY NOT BE CONSTITUTIONALLY DISCHARGED FOR EXERCISING HIS FOURTH AMENDMENT RIGHTS IS CONSISTENT WITH THIS COURT'S DECISIONS AND CREATES NO CONFLICT AMONG THE LOWER COURTS.

A. PETITIONER HAS FAILED TO CITE ANY AUTHORITY FOR THE PROPOSITION THAT A PUBLIC EMPLOYEE MAY BE DISCHARGED FOR EXERCISING A CONSTITUTIONAL RIGHT.

The Fourth Amendment protects municipal employees from unreasonable employer searches of the person in the disciplinary context. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 S.Ct. 1384, 103 L.Ed. 2d 685 (1989); *Railway Labor Executives Assoc. v. Skinner*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed. 2d 639 (1989); *Kirkpatrick v. City of Los Angeles*, 803 F.2d 485 (9th Cir. 1986). Thus, a suspicion-based search and seizure of body fluids conducted pursuant to administrative order based upon pain and penalty of insubordination for refusal to obey implicates the Fourth Amendment and is only lawful if it is reasonable. Discipline for insubordination must be predicated only upon the refusal to obey a lawful order; that is, one that is constitutionally reasonable. *Los Angeles Police Protective League v. Gates* (hereafter, *"LAPPL v. Gates"*) 907 F.2d 879, 886 (9th Cir. 1990). In the event of a "refusal" no search occurs. The order alone, which

is not obeyed, is not a constitutional wrong. The order alone constitutes only a threat that discipline will be forthcoming. Improvident orders can be withdrawn, and no one would say that liability would flow from an unreasonable order which is promptly withdrawn, or where the refusal to obey is ignored and no adverse action follows. No harm occurs until discipline is initiated. Then, the Fourth Amendment is violated and any resulting discipline is unconstitutional. *LAPPL v. Gates*, 907 F.2d at 895; *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987). So, in our facts, the constitutional harm was inflicted not by the investigators who gave the order, but rather by Chief Gates who discharged Jackson for his "insubordination". Nevertheless, the constitutional injury to Jackson stems from his Fourth Amendment rights.

B. PETITIONER FAILS TO DISTINGUISH THIS COURT'S DECISIONS HOLDING THAT A PUBLIC EMPLOYEE MAY NOT BE DISCHARGED FOR EXERCISING A CONSTITUTIONAL RIGHT.

This Court has held that public employees' First Amendment rights may be violated by punishing the lawful exercise thereof, as well as by restraining lawful speech in the first place. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968), *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed. 2d 708 (1983); *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983). Further, public employees' Fifth Amendment rights are violated by disciplining them for refusal to waive their rights against self-incrimination as a condition of employment. *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); *Gardner v. Broderick*, 392 U.S. 273, 276-79, 88 S.Ct. 1913, 20 L.Ed. 2d 1082 (1968). By parity of reasoning, Jackson's punishment

violated the Fourth Amendment because he was made to suffer job loss as a consequence of the lawful exercise of the right to refuse an unconstitutional search. Apart from this reasoning, whether the punishment for Jackson's refusal to obey an unconstitutional order is deemed to violate the Fourth Amendment or the Fourteenth Amendment due process clause, will not change the consequences of that act, nor the result approved by the Court of Appeals.

It is true that respondent initially claimed violations of his Fourth and Fourteenth Amendment rights. The latter claim was based on the theory that Gates' action was arbitrary and irrational. The District Court and the Court of Appeals disagreed. However, simply because Gates' action may not have been irrational does not mean it did not violate due process if the order upon which it was predicated was unconstitutional. All agree that a police officer may not be punished for refusing to obey an unconstitutional order. While acknowledging this, petitioner would have this Court deny an aggrieved officer recovery for consequential damages unless the governmental conduct was irrational. The due process clause is not so impotent. Petitioner fails to see a distinction in due process claims which allege solely that the government conduct was arbitrary and irrational, from those as here, where the government action implicates an independent constitutional right -- the Fourth Amendment.

If petitioner is correct that the government action became a due process violation once discipline was undertaken, then it must also accept that the due process clause provides a remedy once it is established that the discipline is based upon the refusal to obey an order which, standing alone, is unconstitutional. To hold otherwise would deny constitutional protection in all cases except only the most

egregious, irrational, arbitrary and wholly unreasonable acts of final policymakers.

Finally, Petitioner fails to acknowledge or distinguish this Court's decisions holding that public employees may not constitutionally be discharged for exercising a constitutional right.

III.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE FRAMEWORK DEVELOPED BY THIS COURT IN NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB, AND *RAILWAY LABOR EXECUTIVES ASSOC. V. SKINNER*, AND CREATES NO CONFLICT AMONG THE LOWER COURTS.

A. THERE IS NO DISPUTE OR CONFLICT REGARDING THE APPLICABILITY OF THE BALANCING TEST IN *VON RAAB* TO THIS CASE.

Carefully drawn government testing regulations approved in *Von Raab* and *Railway Labor Executives Assoc.* eliminate the need for individualized suspicion because they do not involve the exercise of supervisory discretion in selecting who will be tested, and when and how it will occur. Consequently, the potential for arbitrariness and abuse is non-existent.

On the other hand, here the Court of Appeals determined that where, on the basis of investigatory activity, a police officer is taken form his home in the middle of the night

against his will, and ordered to provide a sample of his urine for testing because he is individually suspected, a "reasonable suspicion" standard should be respected. In applying the balancing test of *Von Raab*, to the specific facts of this case, the Court of Appeal determined that the order was not reasonable.

Random and event-triggered testing provisions frequently do coexist with suspicion-based provisions within the same government regulations. See, for example, *National Federation of Federal Employees v. Cheney*, 884 F.2d 603, 605-06 (D.C. Cir. 1989); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989), *cert. denied*, 493 U.S. 963, 110 S.Ct. 404, 107 L.Ed. 2d 370 (1989); and *Policemen's Benevolent Association of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133, 135 (3rd Cir. 1988).

Other cases approve of the "reasonable suspicion" standard in suspicion-based testing. See, for example, *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3rd Cir. 1988); and *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 868 F.2d 74 (3rd Cir. 1988).

However, there are no cases which suggest or adopt petitioner's view that *Von Raab* and *Railway Labor* abolished the need in every case for reasonable suspicion to support a suspicion-based order. On these grounds as well then, no review is warranted.

B. THE COURT OF APPEALS DETERMINED THAT JACKSON HAD A LEGITIMATE EXPECTATION OF PRIVACY AGAINST AN INDIVIDUALIZED SEARCH BASED WHOLLY ON A SUPERVISOR'S UNFETTERED DISCRETION.

The decision only holds that, unlike *Railway Labor* and *Von Raab*, the facts of this case concern a wholly unbridled exercise of supervisory discretion in singling out Jackson for testing. Since, under the facts, the search order was not reasonable, it violated the Fourth Amendment. Again, there is nothing in the opinion that warrants review.

CONCLUSION

For all of the above reasons, it is respectfully suggested that the petition should not be granted.

Dated: May 25, 1993

Respectfully submitted,

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